

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2116

United States Court of Appeals

For the Second Circuit.

EDWARD L. KIRKLAND and NATHANIEL HAYES, each
individually and on behalf of all others similarly situated,
Plaintiffs-Appellees.

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES; RUSSELL OSWALD, individually and in his capacity as
Commissioner of the New York State Department of Correctional
Services; THE NEW YORK STATE CIVIL SERVICE
COMMISSION; ERSA POSTON, individually and in her capacity as
President of the New York State Civil Service Commission and Civil
Service Commissioner; MICHAEL N. SCELSI and CHARLES F.
STOCKMEISTER, each individually and in his capacity as Civil
Service Commissioner,

Defendants-Appellants.

and

ALBERT M. RIBEIRO and HENRY L. COONS,
Intervenors-Appellants.

*On Appeal From The United States District
Court For The Southern District of New York*

JOINT APPENDIX

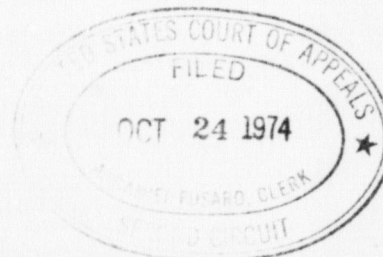
Volume I

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PAGINATION AS IN ORIGINAL COPY

September 29, 1975

Honorable A. Daniel Fusaro
Clerk,
United States Court of Appeals
for the Second Circuit
United States Courthouse,
17th Floor
Foley Square
New York, New York 10007

for binding cc

B
74-2116

Re: Kirkland v. New York State De-
partment of Correctional Services
No. 74-2116

Dear Mr. Fusaro:

It has just come to my attention that a record citation was omitted from Appellee's Petition for Re-hearing in the above-styled case. At page 7 of the Petition, the first full sentence, which starts "With respect to pre-1970 Sergeant examinations," should be followed by the citation "A.471-72."

Also, with respect to the citation following the second sentence on page 7 to A.349-50 there may be some confusion caused by an error in pagination of the Appendix. The pages of the Appendix are numbered consecutively up to A.356, then start again at A.347. The reference in the Petition is to the second set of pages numbered A.349-50, corresponding to pages 112-113 of the trial transcript.

I am enclosing fifteen copies of the letter, and would appreciate your circulating same to the members of the Court.

Very truly yours,

Deborah M. Greenberg
Deborah M. Greenberg

DMG:gdh
--Encls.

cc.: Hon. Louis J. Lefkowitz
Richard R. Rowley, Esq.

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DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE LASKEP

Jury demand date:

73 CIV 1548

U. S. Form No. 106 Rev.

EDWARD L. KIRKLAND and NATHANIEL
HAYES, each individually and on behalf
of all others similarly situated,

and

BROTHERHOOD OF NEW YORK STATE
CORRECTION OFFICERS, INC.,

Plaintiffs,

- vs -

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES;

RUSSELL OSWALD, individually and in
his capacity as Commissioner of
the New York State Department of
Correctional Services;

THE NEW YORK STATE CIVIL SERVICE
COMMISSION;

ERSA POSTON, individually and in her
capacity as President of the New
York State Civil Service
Commission and Civil Service
Commissioner;

MICHAEL N. SCELSI and CHARLES F.
STOCKMEISTER, each individually
and in his capacity as Civil
Service Commissioner,

Defendants.

ATTORNEYS

For plaintiff:

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10 Columbus Circle,
N.Y.C. N.Y. 10019
586- 8397

For defendant:

BURTON RITTER
535 Fifth Avenue,
N.Y.C. N.Y.
682- 5552

For defendant:

Louis J. Lefkowitz
2 World Trade Center, NYC 10047

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
I.S. 5 mailed <input checked="" type="checkbox"/>	Clerk	4/10/73	Maack	N	
I.S. 6 mailed <input checked="" type="checkbox"/>	Marshal	4/10/73	Maack	N	
Basis of Action:	Docket fee	4/10/73	Maack	5-	
CIVIL RIGHTS.	Witness fees	4/10/73	Maack	5-	
Action arose at:	Depositions	4/10/73	Maack	5-	

DOCKET ENTRIES

JUDGE LASKER

Edward V. Kirkland et al., etc. vs. The N.Y. State Dept. of Correc. Service, et al.

73 Civ. 1541

DATE	PROCEEDINGS	Date Order of Judgment
Apr 10-73	Filed Complaint. Issued Summons.	
pr. 10-73	Filed Order to Show Cause. Re: Preliminary Injunction & Temp. Restraining Order. Ordered restraining & enjoining dfts. their officers, as indicated. Lasker J. ret. 4/11/73.	
pr 10-73	Filed Preliminary Memorandum in support of Pltffs. application for a temporary restraining order & for the issuance of a preliminary injunction.	
pr 10-73	Filed Pltffs. request for production of documents to dfts. Poston & N.Y. State Civil Service Commission.	
pr. 11-73	Filed Order. This Order clarifies & supplements the Temporary restraining Order previously enter by this court. So Ordered Lasker J. (M/N)	
pr 17-73	Filed Affidavit of Service by Deborah M. Greenberg.	
pr 20-73	Filed Stip & Order by all parties that the aforesaid Temp. Restraining Order & supplemental Order shall be extended & remain in effect until decision on the merits or earlier rules on pltffs. application for a preliminary injunction. Lasker J.	
May 7-73	Filed defts notice of motion, Re; Dismiss complaint, ret before Lasker J. on 5/14/73	
May 7-73	Filed defts' memo of law, in support of its motion.	
May 4-73	Filed Pltffs request for Production of documents,	
May 4-73	Filed Pltffs Interrogatories adressed to defts.	
May 11-73	Filed Pltffs notice of motion, Re: Objection to Interrogatories. Ret before Lasker J. on 5/16/73	
May 11-73	Filed Pltffs memo in opposition to motion to dismiss.	
May 15-73	Filed Pltffs notice to take deposition of the deft. N.Y.S. Civil Service Comm. on 6/5/73.	
May 16-73	Filed defts REPLY affidavit by Stanley L. Kantor.	
May 16-73	Filed defts affidavit in opposition by Stanley L. Kantor	
May 17-73	Filed Order, that the defts deliver to pltffs counsel a copy of the civil service examination #34944 held Oct 14, 1972 for the position of Correction Sergeant (Male) and the answers thereto on or before 5/18/73, So Ordered Lasker J. m/n	
May 29-73	Filed Pltffs notice to take deposition of the deft. N.Y.S. Dept. of Correctional Services on 6/7/73	
Jun 5-73	Filed Order that deft. deliver to pltffs counsel on or before 6/18/73 for each individual in each of the Categories hereinafter set forth, the following information contained in such individual's personal folder as indicated. So Ordered Lasker J.	
Jun 4-73	Filed memo endorsed on motion papers dtd. 5/11/73, Motion denied as moot. So Ordered Lasker J. m/n	
Jun 14-73	Filed Pltffs notice of motion, Re: Class action determination, ret before Lasker J. on 6/25/73	
Jun 14-73	Filed pltffs memo of law, in support of its motion.	
Jun 11-73	Filed Memorandum & Order by Lasker J. defts motion to dismiss or transfer is denied, So Ordered Lasker J. m/n	
Jun 25-73	Filed defts' memo of law in opposition to motion to declare action a class action.	
Jun 26-73	Filed Pltffs notice of motion, Re: compel answers to Interrogatories, ret before Lasker J.	
Jun 26-73	Filed pltffs amended complaint.	
Jun 26-73	Filed pltffs answers to defts Interrogatories.	
Jun 28-73	Filed defts answers to pltffs Interrogatories.	
Jun 28-73	Filed defts supplemental answers to pltffs first set of Interrogatories.	
Jun 20-73	Filed pltffs notice to take deposition of the defts on 6/26/73	
Jul 9-73	Filed defts affidavit in opposition by Judith A. Gordon to motion for a class action order.	
Jul 6-73	Filed pltffs reply memo in support of motion for a class action.	
Jul. 6, 73	Filed pltf. preliminar Statement of issues for trial.	

Lasker J. 2

July 16-73 Filed affd. of David L. Baker in opposition to notice to intervene.

Jul.16,73 Filed deposition of Gerard Ryder. (n/m)

Jul.16,73 Filed deposition of Stephen Jaffee. (n/m)

Jul.16,73 Filed deposition of Dr. Allan H. Bush.

Jul.16,72 Filed deposition of Samuel J. Taylor.

Jul.17,73 Filed pltf. pre trial specification.

Jul.16,73 Filed pltf. memo in opposition to application for intervention by
White Provisional Correction Sergeants Jackson,

July 1 -73 Filed deposition of Gerard Ryder - mailed notice

July 19-73 Filed pre-trial memorandum for pliffs.

July 19-73 Filed certificate of service of pliffs' preliminary statement of issues
for trial

July 19-73 Filed deposition of Brotherhood of New York State Correction Officers
by Edward L. Kirland- mailed notice

July 19-73 Filed deposition of Edward L. Kirland, mailed notice

Jul.20-73 Filed deft. trial Memo.

July 20-73 Filed deposition of Kenneth L. Siegal-mailed notice

July 20-73 Filed deposition of Gerard Ryder-mailed notice

July 23-73 Filed descriptive material & documents submitted pursuant to agreement
between attys.

July 23-73 Filed defts' notice to take deposition of Nathaniel Hayes

July 23-73 Filed defts' notice to take deposition of Brotherhood of NY Correctional
officers.

July 23-73 Filed defts' supplementary list of materials to be offered in evidence.

July 23-73 Filed defts' first interogs.

Jul.19-73* Filed pltf. memo in opposition to application for intervention.

Jul.27-73 Filed deposition of Richard Barrett. (n/m)

Jul.23-73 Non-Jury trial begun before LASKER,J.

Jul.24-73 Trial contd.

Jul.25-73 Trial contd.

Jul.26-73 Trial contd.

Jul.27-73 Trial contd.

Jul.30-73 Trial contd. and concluded. Dec. Res.

Jul.19-73 Filed Order to show cause, Ret. July 17-73: pursuant to Rule 24(a)42
F.R.C.P. permitting pliffs to intervene. LASKER,J.

Jul.19-73 Filed MEMO END. on pltf. order to show cause: Motion to intervene is
denied. *** Modification of Existing Order. *** To lift the ordered
freeze in the present critical stage immediately prior (cont'd on page 3)

(Cont'd. from page 2) to trial,*** would be disruptive and have an adverse effect on the morale of the Correction Service. Movants have made no showing of irreparable harm to them pendente lite.

* The motion is denied. So Ordered. LASKER, J.

ct. 4-73 Filed affdvt. of Morris J. Baller

ct. 4-73 Filed post trial memorandum for pliffs.

op. 28-73* Filed transcript of record of proceedings dated July 23, 24, 25, 26, 27, 30-73.

ct. 15-73 Filed pliffs. proposed findings of fact and conclusions of law.

or. 1-74 Filed OPINION #40,535--Examination 34-944- is declared unconstitutional and is set aside. Defts. are enjoined from making permanent appointments to the position of Correction Sergeant from the eligible list which is based on its results and from terminating the provisional appointments to that position of pliff. class members solely because of their failure to pass the examination. Defts. are instructed to submit a memorandum on the subjects delineated above within 10 days of the filing of this opinion, pliffs. to reply within one week thereafter. pliffs. are awarded reasonable costs, including attys' fees, in an amount to be determined after further documentation by the parties. It is so ordered--Lasker, J.-mailed notice.

or. 25-74 Filed affdvt & order to show cause granting leave for Albert M.

Ribeiro & Henry L. Coons to intervene as a party deft. Ret. 5-10-74.

Apr. 25-74 Filed pliffs notice of motion for leave to serve certain defts personally, time & date to be set by Court.

Apr. 25-74 Filed pliffs reply memo on relief.

Apr. 30-74 Filed notice of appeal by defendants from the judgment and order entered on or about April included in this appeal the interlocutory order issued on or about April 10, 1973, sta defts from termination the appointments of the named plaintiffs, etc. m/n

May 15-74

May 6-74 Filed Interveners MEMO on Intervention and relief.

May 6-74 Filed deft's affdvt in response to application of A.M. Riverio & H.L. Coons to intervene as defts.

May 8-74 Filed Interveners' memo on intervention and relief.

May 13-74 Filed pliffs memo in opposition to intervention of Alberto M. Ribeiro, et al

May 16-74 Filed interveners' reply memorandum on intervention

May 16-74 Filed Interveners' reply memo on intervention.

May 28-74 Filed interveners' memorandum on class.

Jun 19, 74 Filed Pliffs' Notice of Motion ret. 7-1-74. Re:for leave to serve named defts. personally.

DATE	FILINGS-PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
6-24-74	Filed defts' affdvt in opposition to plttfs' motion for leave to serve certain parties.	
6-24-74	Filed defts' supplemental affdvt on relief	
6-25-74	Filed Intervenor-Defts' Paragraphs for proposed order.	
6-25-74	Filed Intervenor-Defts' Brief on proposed order and relief.	
6-25-74	Filed Afft. & Notice of Motion of Intervenor-Deftom for an order pur to Rule 21,FRCP...motion ret. Jul2,74. Rm 2903..at 10AM...	
6-25-74	Filed Intervenor-Defts' Memo of Law in support of motion to add parties pur. to Rule 21...	
7-19-74	Filed Plttfs' supplemental memo on intervention of A. M. Ribeiro, et al.	
7-19-74	Filed Memo-End on back of unsigned order....Motion to intervene granted in accordance with statement on the record 7-15-74..Motion by intervenor-defenants for a class action dtermination denied in accordance with statement on th record 7-15-74. It is so Ordered..Lasker, J.	
7-19-74	Filed Memo-End on back of motion filed 4-25-74...Motion denied in accordance with statement on the record 7-15-74...It Is So Ordered...Lasker, J.	
7-19-74	Filed Memo-End on back of Notice of Motion filed 6-25-74...Motion denied in accordance with statement on the record 7-15-74..It is So Ordered. ...Lasker, J.	
7-31-74	Filed Order & Decree that examination No.34-944 is declared invalid as violating the Constitution of the U.S.....The Court retains jurisdiction for such period as is necessary to supervise this decree and further proceedings thereunder, and to determine the reasonable value of plttfs' services...Lasker, J. M/N	
Aug.20-74	Filed Notice of appeal by defts from Order & Decree of 7-31-74. Copy mailed to Jack Greenberg, 10 Columbus Circle, NYC 10019.	
Aug 29-74	Filed INTERVENORS'S Notice of Appeal to USCA from the order & decree dated 7-31-74. Copies mailed 8-30-74 to: Jack Greenburg esq.10 Columbus Cir. NYC & Louis Lefkowitz Atty Gen. of N.Y. 2 World Trade Center.,NYC	

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk

A-5

By R. Edwards
Deputy Clerk

SUMMONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
EDWARD L. KIRKLAND, et al.,

Plaintiffs,

vs.

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants.
-----x

No. 73 Civ. 1946

SUMMONS

You are hereby summoned and required to serve upon Jack Greenberg, Jeffery A. Mintz, Deborah M. Greenberg, Morris J. Heller, 10 Columbus Circle, Suite 2030, New York, N.Y., and Burton Ritter, 535 Fifth Avenue, New York, New York, plaintiffs' attorneys, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Please serve all papers on the above-named counsel for plaintiffs.

[Signature]
Clerk of Court

By: [Signature]

Deputy Clerk

Date: 4/10/73

(NOTE: This summons is issued pursuant to
Rule 4, Federal Rules of Civil Procedure.)

VERIFIED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,	:	
and	:	104
BROTHERHOOD OF NEW YORK STATE CORRECTION OFFICERS, INC.,	:	No. 73 Civ. 104
Plaintiffs,	:	<u>COMPLAINT</u>
- vs -	:	(Class Action)
THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES;	:	
RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services;	:	
THE NEW YORK STATE CIVIL SERVICE COMMISSION;	:	
ERSA BOSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner;	:	
MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,	:	
Defendants.	:	
----- X	:	

JURISDICTION

1. This proceeding is brought under (1) 42 U.S.C. §1981, providing for the equal rights of all citizens and persons within the jurisdiction of the United States; (2) 42 U.S.C. §1983, providing the right of civil action to redress

deprivation under color of state law, statute, ordinance, regulation, custom, or usage of rights, privileges, or immunities secured by the Constitution and laws; (3) the Fifth and Fourteenth Amendments to the Constitution of the United States, guaranteeing all persons against denial of due process of law by the States and their agencies and securing to all persons the equal protection of the laws. In this action plaintiffs seek to redress and enjoin violations of those provisions of the Constitution and laws of the United States. Plaintiffs also seek a declaratory judgment pursuant to 28 U.S.C. §2201. This Court has jurisdiction under 28 U.S.C. §1343(3) and (4).

CLASS ACTION ALLEGATIONS

2. (a) Plaintiffs bring this action as a class action maintainable under Rule 23(b)(1) and (2), Federal Rules of Civil Procedure.

(b) The class includes:

- (i) all persons similarly situated to the named plaintiffs, to wit: all those Black or Hispanic persons presently employed by the New York State Department of Correctional Services as Correction Officers (Male) who took civil service examination number 34944 for permanent appointment to the position of Correction Sergeant (Male) but by virtue of their performance on the examination are not eligible for, or will not be appointed to, the Correction Sergeant position; and

(ii) all Black or Hispanic persons employed by the New York Department of Correctional Services as Correction Officers (Male), whose opportunity to advance to the position of Correction Sergeant is limited and impeded by the defendants' policy and practice of determining promotions to the Correction Sergeant position on the basis of a written examination of the nature of civil service examination number 34944; and who are or may be deterred from seeking promotion because of that or similar examination procedures.

(c) The class as defined above includes approximately 200 persons in category (i) and an additional 240 persons in category (ii), for a total numerosity of approximately 440 persons. This number of persons makes joinder of all class members impracticable.

(d) The named plaintiffs, Kirkland and Hayes, are fully representative members of the class and will fairly and adequately protect class members' interests. They are, as more fully set forth in paragraph 3 below, former Black Correction Officers who have repeatedly and unsuccessfully sought promotion to the rank of Correction Sergeant, who have taken the examination here challenged and failed to pass it, and who are now in imminent danger of losing present positions as Provisional Sergeants as a result of appointments based on that examination. Plaintiff Brotherhood, as more fully appears in paragraph 4 below, is the organization which represents the interests of class members within the State Department.

ment of Correctional Services, and to which a majority of class members belong. These plaintiffs have no interests antagonistic to those of the class, and are not engaged in a collusive lawsuit. They are represented by counsel experienced and competent in the conduct of litigation of this nature.

(c) The questions of fact common to the class include:

- (i) Whether Black and Hispanic persons are significantly under-represented in the ranks of Correction Sergeants?
- (ii) Whether Black and Hispanic persons have been and continue to be excluded from the rank of Correction Sergeants by the civil service examination system maintained and administered by defendants?
- (iii) Whether the civil service examinations on which promotion to Correction Sergeant depends have the effect of disproportionately screening out and deterring Black and Hispanic applicants, and whether they are not significantly job-related?
- (iv) Whether the procedure under which defendants administer and grade the civil service examinations, and establish eligibility lists based on them, is arbitrary, secretive, and subject to racially and ethnically discriminatory manipulation, falsification, or abuse?
- (v) Whether certain features of defendants' system for promotion and demotion of persons

between the ranks of Correction Officer and Correction Sergeant contains features which prevent or inhibit the promotion of Black and Hispanic persons within all institutions of the State Department of Correctional Services?

- (f) The questions of law common to the class include:
- (i) Whether the relative absence of Black and Hispanic persons in the position of Correction Sergeant indicates that defendants have discriminatorily and unlawfully denied such persons access to that position?
 - (ii) Whether defendants' examinations, including examination number 34944, have been and are unlawful, in that they disproportionately deter and screen out Black and Hispanic persons, and are not and could not be shown valid or job-related?
 - (iii) Whether appointments from the Eligible List promulgated pursuant to examination number 34944 would or will violate rights of Black and Hispanic persons protected by the Constitution and laws?
 - (iv) Whether the arbitrary, secretive, and easily manipulable system of developing and scoring examinations and ranking eligibles violates, or tends to violate, the due process and equal protection rights of Black and Hispanic Correction Officers?

- (v) Whether the factors which impede or deter promotion of Black and Hispanic persons to the position of Sergeant in all the correctional institutions of the defendant Department of Correctional Services are unlawful and discriminatory?
- (vi) The nature of appropriate injunctive and affirmative relief from defendants' unlawful practices and their effects.

THE PLAINTIFFS

3. Plaintiff Edward L. Kirkland is a black citizen of the United States and the State of New York, and a resident of Kings County, New York. He was first employed by the Department of Correctional Services as a Correction Officer in July, 1961. He has been employed by the Department ever since then. In August, 1972 he was appointed by the Commissioner to the position of Provisional Sergeant. He remains in that position at present. His performance, both as Correction Officer and as Acting Sergeant, has at all times been satisfactory. Plaintiff Kirkland has taken the promotional examination necessary for permanent appointment to Sergeant each time he could during his tenure: in approximately 1965, in 1968, and in October, 1972. The last examination was designed civil service examination number 34944. Plaintiff Kirkland has never achieved the minimum passing score on these examinations. On March 16, 1973 he was notified that he had failed, scoring 65. Within one day after that notification, plaintiff Kirkland requested in writing to see his examination paper and scoring, as permitted by civil service rules. His request was ignored.

Plaintiff Kirkland's present position as Acting Sergeant is imminently jeopardized by the results of examination number 34944. The eligible list, promulgated March 15, 1973 and based on examination results, defines who will receive permanent Sergeant positions. When appointments are made from this list, plaintiff Kirkland's Provisional Sergeant job will be eliminated, and he will be forced to return to a Correction Officer position of significantly less responsibility and pay. Moreover, because of defendants' "seniority", bidding, and assignment rules, he will not be able to re-occupy the relatively desirable Correction Officer slot he held prior to August, 1972, but will be forced into a far less desirable position.

4. Plaintiff Nathaniel Hayes is a black citizen of the United States and the State of New York, and a resident of Queens County, New York. He has worked for the Department of Corrections at the Ossining facility since April, 1961. He worked until August, 1972 as a Correction Officer, at all times receiving satisfactory performance ratings. In August, 1972 he was appointed Provisional Correction Sergeant. During this period, he successfully completed a number of advanced courses and training programs in fields related to correctional services. After working as Provisional Sergeant at Ossining until October, 1972, plaintiff Hayes was offered and accepted a position in the Training Academy in Albany, as an instructor, still with the rank of provisional sergeant. He retains that position today. Plaintiff Hayes has taken the promotional examination necessary for permanent appointment to Sergeant each time he was eligible during his tenure: in approximately 1965, in 1968, and in October, 1972 (examination number 34944). He has failed the examination all three times.

On March 16, 1973 plaintiff Hayes was informed that he had failed examination number 34944, with a score of 64.

On April 4, 1973 plaintiff Hayes was informed that he would be returned to the rank of Correction Officer when appointments were made from the Eligible List promulgated March 15, 1973, and that he would have to re-apply even to remain, with reduced rank and pay, at the Training Academy.

5. Plaintiff Brotherhood of New York State Correction Officers, Inc. (hereafter the "Brotherhood"), is an incorporated organization representing all Black and Hispanic employees of defendant Department of Correctional Services. It was incorporated in August, 1965 and has existed continuously ever since. It maintains offices in New York County, and participates, informally, in negotiations, plans, and programs relevant to Black and Hispanic correctional workers. Its membership pays dues and includes the majority of all Black and Hispanic persons employed by the Department of Correctional Services. Plaintiff Kirkland is President of the Brotherhood. Plaintiff Hayes is Vice-President of the Brotherhood.

D E F E N D A N T S

6. Defendant Russell Oswald is Commissioner of the defendant New York State Department of Correctional Services. Defendants Oswald and the Department define and control the jobs of Correction Officer (Male) and Correction Sergeant (Male), and employ the over 4,500 persons holding those positions. Defendants Oswald and the Department are responsible for promoting, appointing, and employing persons certified to them on the Eligible List for Correction Sergeant. In addition, on information and belief, defendants Oswald and the

Department, and their subordinates, participated in developing examination number 34944 and drafted certain questions thereon. Defendants Oswald and the Department are charged with maintaining correctional facilities at locations throughout New York State, including Greenhaven, Ossining, Clinton, Attica, Elmira, Coxackie, Albion, Auburn, Great Meadows, and Wallkill.

7. Defendant Ersa Poston is President of the New York State Civil Service Commission and a member of the Commission. Defendants Scelsi and Stockmeister are also Commissioners. The Commission is charged by state law with responsibility for developing and administering civil service examinations for the position of Correction Sergeant. Pursuant to this authority defendants Poston, Scelsi, Stockmeister, and the Commission developed and administered examination number 34944. Defendants Poston, Scelsi, Stockmeister, and the Commission are also charged by law to prepare and promulgate Eligible Lists for the Correction Sergeant position, based on examination results. Pursuant to this authority, defendants Poston, Scelsi, Stockmeister, and the Commission promulgated an Eligible List on March 15, 1973, based on the results of examination number 34944. Defendants Poston, Scelsi, and Stockmeister are sued both individually and in their representative capacities.

STATEMENT OF FACTS

8. Black and Hispanic persons are grossly under-represented in the ranks of Correction Sergeants in the facilities maintained by defendant State Department of Correctional Services. This under-representation is severe when measured against the composition of the State's population as a whole, and it becomes extreme when measured against

the predominantly Black and Hispanic population of the State's correctional facilities. There were as of January, 1973, 413 white male Correction Sergeants employed by the Department of Correctional Services, but only 13 Black males and one Hispanic male. Blacks thus comprised only 3.0% of the total number of Sergeants, and Hispanics less than 0.3%. This under-representation of Blacks and Hispanics is significant even in relation to the proportion of Black and Hispanic males in the Correction Officer (Male) position, in which position minority groups also form substantially less of the workforce than of the inmate or general population. The Correction Officer force includes 3712 white males, but only 341 Blacks (8.2%) and 102 Hispanics (2.5%). Of all 457 Blacks and Hispanics employed as Correction Officers or Sergeants, only 14 (3.1%) hold the higher position. In comparison, 413 (10.0%) of the 4125 white males in these positions were in the higher category.

9. Under-representation of Blacks and Hispanics in the Sergeant rank is even more severe than the figures cited in paragraph 9 would indicate. Of the thirteen Blacks employed as Sergeants, all are (like plaintiffs) only on Provisional status. Only 2 Blacks and no Hispanics have ever held permanent appointment as Sergeants; one is now a Captain and one a Lieutenant. One of these two Blacks is now on leave. Thus, if the Provisional Sergeants are displaced as a result of appointments from defendants' Eligible List, not a single Black or Hispanic person who now works as a Sergeant would remain on duty, in a force of over 400 Sergeants; and only one or two Blacks or Hispanic persons would be employed at any supervisory level.

10. Defendants Poston, Seelsi, Stockmeister, and the State Civil Service Commission administered the application process for the position of Sergeant in the months before and after October, 1972, as they (or their predecessors in office) had in previous years. The examination was written and developed under their ultimate supervision; they published notice of the examination and processed applications to take it; administered the examination on October 14, 1973; scoring and ranking was done under their supervision; and they established the Eligible List based on the examination scores on March 15, 1973. Passing score is 70. Rank on the Eligible List was based on score on the examination, the highest being 89.3 (including Veteran's Credit).

11. Examination number 34944 was taken by 1435 persons seeking appointment as Sergeants. Of these, 406 (28.3%) passed, and 1029 (71.7%) failed. Approximately 200 Blacks and Hispanics were among the 1435 who completed the test. On information and belief, only 6 (3.0%) of these passed. In excess of 30% of the whites passed. Thus, the pass rate of Black and Hispanic test-takers was less than one-tenth that of white test-takers.

12. Of the top 90 persons on the Eligible List established March 15, 1973 in order of examination scores, only one is Black and none is Hispanic. The one ranking Black is number 79 on the list. The other five Blacks or Hispanics who passed the examination did not rank within the top 90 persons on the Eligible List.

13. On information and belief, defendants Oswald and State Department of Correctional Services intend to appoint 90 Sergeants forthwith, based on the recently-established Eligible List. These appointments are, on information and belief, due to be made beginning as early as April 11, 1973. The Black and Hispanic participation in these appointments will be 1.1%.

14. When permanent appointments are made from the Eligible List, persons holding Provisional Sergeant status, including the named plaintiffs Kirkland and Hayes as well as nine other Black or Hispanic persons, will be displaced. They will then revert to Correction Officers, at an annual pay rate of \$1,200 less than they presently earn. As Correction Officers, they will not be able to return to their last-held assignments, but rather will be compelled to seek vacant positions not presently filled or desired by other Correction Officers, without regard to their relative seniority as Correction Officers.

15. Examination number 34944 was a typical civil service paper-and-pencil test. It was not reasonably designed to, nor did it, accurately measure those qualities necessary to the successful performance of the job of Correction Sergeant (Male). On information and belief, successful performance on examination 34944 is not significantly related to job performance in the position of Correction Sergeant (Male).

16. On information and belief, defendants have conducted no professionally or legally sufficient study or survey of the of the relationship between performance on examination number 34944 and ability to function as a Correction Sergeant (Male). On information and belief, said examination has not been, and cannot be reasonably shown to bear a significant relationship to that job.

17. The existence of the civil service examination requirement, and the nature of examination number 34944 and previous examinations, has had the effect of discouraging or deterring members of the class from seeking appointment to the position of Correction Sergeant (Male). As a consequence, such class members have remained in the position of Correction Officer (Male).

18. On information and belief, the fact that, under the existing rules, regulations, and procedures governing the re-transfer of persons from Provisional Sergeant to Correction Officer, such persons are not able to recover their proper Correction Officer assignment, nor to bid freely for any such position, nor to exercise full "seniority" rights in that position, has discouraged or deterred class members from seeking or accepting appointment as Provisional Sergeants. Plaintiffs know of at least one case in which this factor has had the described effect.

19. Neither plaintiffs nor other class members were afforded any opportunity to inspect their examination papers for examination number 34944 nor the scoring thereon. Scoring of examination number 34944 and promulgation of the resulting Eligible List required an unusual and inordinate length of time - six months. Other, similar civil service examinations - such as a recent police Sergeant examination - are routinely processed in a matter of several weeks.

20. Certain aspects of the procedure by which examination number 34944 was developed, administered, and scored would lend themselves to racially and ethnically discriminatory application. Practices of nepotism have historically permeated the appointment process in the Department of Correctional Services. Supervisory officials of that Department participated in developing and formulating many of the questions on examination number 34944. Such officials are virtually 100% white.

21. On information and belief, defendants have recently instituted a "zone" system governing promotions from Correction Officer to Correction Sergeant. Under this system, the right or ability of Correction Officers to seek appointment as Correction Sergeants in penal institutions in different sections of the State from that in which they presently work is qualified, limited, or subjected to other persons' priority. This system impedes the appointment of class members from one institution and one "zone" to the Sergeant position in another institution or "zone".

22. The vast majority of Black and Hispanic Correction Officers employed by defendant Department of Correctional Services are employed at Ossining. Very few Black and Hispanic Officers work at Upstate penal institutions such as Attica and Clinton, where the institutional employees are virtually all white. The "zone" system described above limits and restricts the opportunity of the majority of class members to seek appointment at Upstate penal institutions and tends to perpetuate the all-white character of the workforce, including Sergeants, at those institutions.

IRREPARABLE INJURY

23. The appointment of ninety or any substantial number of Sergeants from the Eligible List promulgated March 15, 1973 would result in the displacement of the named plaintiffs and the other nine Black Provisional Sergeants from their current positions. These class members would therefore be immediately relegated to positions inferior in responsibility, desirability and pay to their present positions. Other class members who sought promotion to Sergeant and took examination number 34944 would be precluded from obtaining Sergeant's rank.

24. In the past, defendants have administered examinations and made appointments to the Sergeant position once every three to four years. Based on this pattern, on information and belief, class members excluded from the Sergeant position pursuant to the existing Eligible List will not have another opportunity to seek appointment to Sergeant for a like period of years. Black and Hispanic persons will during that period continue to be grossly under-represented and excluded from the position of Correction Sergeant.

VIOLATIONS OF LAW

25. The acts, practices, and policies described in paragraphs 8-22 above, relating to the formulation, administration, and usage of civil service examination number 34944 and to appointments made or to be made to the rank of Correction Sergeant pursuant to that examination, violate the federal rights of plaintiffs and members of the class they represent. Said rights are secured to plaintiffs and members of the class by 42 U.S.C. §§1981, 1983 and by the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

NEED FOR RELIEF

26. Plaintiffs and the class they represent have no adequate remedy at law. They have suffered and are continuing to suffer irreparable injury as a result of defendants' reliance upon promotional examinations which discriminate on the basis of race and ethnic background. These discriminatory acts, practices and policies will continue to injure plaintiffs and class members in the manner described hereinabove, unless and until this Court grants the preliminary and permanent relief requested by plaintiffs. Indeed, appointments to Sergeant positions based on the discriminatorily formulated Eligible List will be made immediately unless the Court enjoins the defendants from this action.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and the class they represent, request that this Court grant them the following relief:

A. Enter a declaratory judgment declaring that the acts, practices, and policies of defendants in formulating and administering examination number 34944 for the position of Correction Sergeant, in establishing an Eligible List based on the results of said examination, and in making appointments based on said Eligible List have deprived and continue to deprive the plaintiffs and members of the class they represent of federal rights secured to them by 42 U.S.C. §§1981, 1993 and the Fifth and Fourteenth Amendments to the United States Constitution.

B. Enter a preliminary and permanent injunction enjoining the defendants New York State Department of Correction Services and Russell Oswald, New York State Civil Service Commission and Ersa Poston, Michael N. Scelsi, and Charles F. Stockmeister, their officers, agents, employees, and successors in office from acting upon the results of any civil service examination for the position of Correction Sergeant (Male) which has not first been properly demonstrated to be valid and significantly related to the Correction Sergeant's position.

C. Enter a preliminary and permanent injunction enjoining the above-named defendants, their officers, agents, employees, and successors in office from making any permanent appointments to the position of Correction Sergeant (Male) based on the results of examination number 34944 or any Eligible List based on performance on that examination, unless and until the defendants have first properly demonstrated that said examination was valid and significantly related to performance of the job of Correction Sergeant (Male).

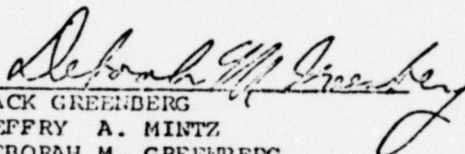
D. Enter a preliminary and permanent injunction enjoining the above-named defendants, their officers, agents, employees and successors in office from terminating or otherwise interfering with the provisional appointments of the Correction Sergeant position of the named plaintiffs and certain members of the class they represent, by reason of the permanent appointment of other persons to the position of Correction Sergeant based on the results of examination number 34944, unless and until the defendants have first properly demonstrated that said examination was valid and significantly related to the job of Correction Sergeant (Male).

E. Enter a preliminary and permanent injunction enjoining defendants, their officers, agents, employees and successors in office from unlawfully discriminating, in any manner whatever, against Black and Hispanic persons and members of the class represented by plaintiffs, with respect to appointments to the position of Correction Sergeant (Male).

F. Retain jurisdiction and require appropriate reporting as to the defendants' compliance with the relief prayed for herein during a period of time sufficient to assure the elimination of all the discriminatory practices complained of and their ongoing effects.

G. Grant plaintiffs and the class they represent such other and further equitable relief as may be appropriate, including suitable affirmative orders designed to remedy the present effects of defendants' past and continuing exclusion of Black and Hispanic persons from the Correction Sergeant position, and reasonable attorney's fees.

Respectfully submitted,


JACK GREENBERG
JEFFRY A. MINTZ
DEBORAH M. GREENBERG
MORRIS J. BALLER
10 Columbus Circle
Suite 2030
New York, New York 10019
Tel. (212) 586-8397

BURTON RITTER
535 Fifth Avenue
New York, New York
Tel. (212) 682-5552

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

v.

THE NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES, et al.,

Defendants.

No. 73 Civ.

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

The undersigned EDWARD L. KIRKLAND, being duly sworn, deposes and says that he resides at 840 Eastern Parkway, Brooklyn, New York 11213; that he is one of the named plaintiffs herein; that he has read the foregoing complaint; and that the allegations of the complaint are true to his own knowledge except as to matters therein alleged on information and belief, and as to those matters he believes them to be true.

Edward L. Kirkland

Sworn to before me

this 11th day of April, 1973.

Notary Public

A-25

The undersigned NATHANIEL HAYES, being duly sworn,
deposes and says that he resides at 187-08 Foch Blvd., St. Albans
Queens, New York 11412 ; that he is one of the named plaintiffs
herein; that he has read the foregoing complaint; and that
the allegations of the complaint are true to his own knowledge
except as to matters therein alleged on information and belief,
and as to those matters he believes them to be true.

Nathaniel Hayes

Sworn to before me
this 4th day of
April, 1973.

Gloria G. O'Neil
Notary Public

NOTARY PUBLIC
New York State
Commission Expires 12/31/74
Gloria G. O'Neil

NOTICE OF FILING OF AMENDMENT OF COMPLAINT
(Made June 22, 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x

EDWARD L. KIRKLAND, et al., :

Plaintiffs, :

-v- :

THE NEW YORK STATE DEPARTMENT OF :

CORRECTIONAL SERVICES, et al., :

Defendants. :

M. E. L.

73 Civ. 1548

NOTICE

PLEASE TAKE NOTICE that plaintiffs have filed the attached Amendment of Complaint in this action, as a matter of right pursuant to Rule 15(a), Federal Rules of Civil Procedure, the defendants not yet having answered or filed responsive pleadings. This 22nd day of June, 1973.

Morris J. Baller

JACK GREENBERG
JEFFRY A. MINTZ
DEBORAH M. GREENBERG
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR PLAINTIFFS

AMENDMENT ADDING PARAGRAPHS
"17A", "17B" and "17C" TO COM-
PLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
EDWARD L. KIRKLAND, et al., :
 : Plaintiffs, :
 : -v- : M. E. L.
THE NEW YORK STATE DEPARTMENT OF : 73 Civ. 1548
CORRECTIONAL SERVICES, et al., :
 : Defendants. :
----- x

AMENDMENT OF COMPLAINT

Plaintiffs hereby amend their complaint in this action
by adding the following allegations immediately following para-
graph 17 of their Complaint, at page 12:

"17A. The defendants have previously
administered other civil service examinations

for the competitive promotion of persons in the Correction Officer (Male) category to the Correction Sergeant (Male) position. Such examinations were given in approximately 1962, in 1965, and in 1968, and defendants subsequently established eligible lists and made appointments based on the results. Those examinations were similar to examination 34944 in both form and general content. Like examination 34944, these prior examinations were not significantly related to the job of Correction Sergeant (Male), but were arbitrary and inaccurate devices for measuring qualities not corresponding to the job. Like examination 34944, the prior tests screened out black applicants in that (i) a far lower percentage of blacks and Hispanics than whites who took the

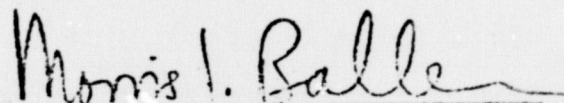
tests made passing scores, and (ii) the few blacks or Hispanics who did achieve passing levels did not rank high enough on the eligible list to be promoted. The present under-representation of black and Hispanic persons in the Correction Sergeant (Male) position is primarily caused by the racially and ethnically disparate effects of those previous examinations.

"17B. Defendants have intermittently administered written civil service examinations for the position of Correction Officer (Male). Black and Hispanic applicants have generally scored lower on these examinations than have white applicants. The under-representation of black and Hispanic persons at the Correction Officer (Male) level is primarily due to the

screening-out effect of these tests. The screening-out effect of the Correction Officer examinations has been magnified by that of the Correction Sergeant examinations, and thereby contributes to the ultimate exclusion of minorities from Sergeant ranks.

"17C. None of the previously-administered examinations for either Correction Sergeant or Correction Officer has been properly validated. On information and belief, no validation has even been attempted."

Respectfully submitted,



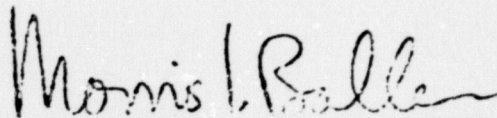
JACK GREENBERG
JEFFRY A. MINTZ
DEBORAH M. GREENBERG
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice and Amendment of Complaint were served by hand this 22nd day of June, 1973, upon counsel of record as follows:

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York
IRVING GALT, ESQ.
Assistant Attorney General of the State
of New York
JUDITH GORDON, ESQ.
Assistant Attorney General of the State
of New York
STANLEY KANTOR, ESQ.
Deputy Assistant Attorney General of the
State of New York
80 Centre Street
New York, New York 10013


Morris J. Baller.

Order to Show Cause For Temporary Restraining Order
Signed April 10, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

9:30 a.m.

-----X
EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

and

BROTHERHOOD OF NEW YORK STATE CORRECTION
OFFICERS, INC.,

Plaintiffs,

vs.

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES; RUSSELL OSWALD,
individually and in his capacity as
Commissioner of the New York State
Department of Correctional Services; THE
NEW YORK STATE CIVIL SERVICE COMMISSION;
ERSA POSTON, individually and in her
capacity as President of the New York
State Civil Service Commission and Civil
Service Commissioner; and MICHAEL N.
SCELSI and CHARLES F. STOCKMEISTER, each
individually and in his capacity as Civil
Service Commissioner,

Defendants.
-----X

73 Civ. 1548

ORDER TO SHOW CAUSE
FOR A PRELIMINARY
INJUNCTION AND
TEMPORARY RESTRAINING
ORDER

13W

5/73

Upon reading and filing the summons and complaint dated

April 10, 1973 and the annexed affidavits of Deborah M. Greenberg, Edward L. Kirkland and Nathaniel Hayes, it is

ORDERED, that the defendants or their attorneys show cause in Room ²⁹⁰³ of the United States Courthouse, Foley Square, New York, New York on April 11, 1973 at 9:30 AM/~~PM~~ why an order should not issue pursuant to Rule 65 of the Federal Rules of Civil Procedure (1) restraining and enjoining the defendants, their officers, employees, agents and successors, during the pendency of this action, from making any permanent appointments to the position of Correction Sergeant (Male) and (2) restraining and enjoining defendants, their officers, employees, agents and successors, during the pendency of this action, from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the

class who are provisional Correction Sergeants (Male).

It appearing to the Court that defendants are about to act in violation of plaintiffs' rights respecting the subject of the action, i.e., make 90 permanent appointments to the position of Correction Sergeant (Male) on the basis of a discriminatory, non-job-related examination, and that such action would tend to render a judgment herein ineffectual, in that the now vacant positions in the title of Correction Sergeant (Male) would be filled, and it appearing that the plaintiffs will suffer immediate and irreparable injury, loss or damages unless the defendants are restrained before a hearing can be had, to wit, plaintiffs will be demoted or returned to the position of Correction Officer, having lost seniority previously acquired in that position as well as the opportunity to be permanently appointed to the position of Correction Sergeant (Male), and it appearing that counsel for the plaintiffs has made reasonable efforts to notify the defendants and their counsel of this application, it is

ORDERED that the defendants, their officers, employees,

agents and successors be and hereby are restrained from making any permanent appointments to the position of Correction Sergeant (Male); and from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants (Male); and it is further

ORDERED, that this order expire within ~~ten~~ ^{five} days after entry unless within such time the order for good cause shown is extended for a like period, or unless the defendants consent that it may be extended for a longer period; and it is further

ORDERED, that pursuant to Rule 16 of the Federal Rules of Civil Procedure the parties or their counsel are directed to attend a conference before Hon. Luzer B. Wyatt, U.S.D.J., at Room ¹²⁰¹ of the United States Courthouse, Foley

at such time as he shall
Square, New York, New York on the _____ day of April, 1973, at *ret*

~~M. for the purpose of ensuring that all facts relevant
to this motion will be available to the court at the hearing,
and it is further~~ *1/10/73*

ORDERED, that, pursuant to Rule 34(b) of the Federal Rules
of Civil Procedure, the defendants Poston and New York State
Department of Civil Service comply with plaintiffs' Request
for Production of Documents filed this date, by producing the
documents requested therein on or before April _____, 1973, and
it is further

ORDERED, that service of copies of this Order and support-
ing papers therein on the defendants shall be sufficient if made
~~personally~~ upon the Attorney General of the State of New York
by the attorneys for the plaintiffs on or before the 10 day of
April, 1973 at ^{5:00 P}~~4:30~~ P.M.

Dated: New York, New York
April 10, 1973

Executed at 4:30 P.M.

15/MEL

U.S.D.J.

*Counsel for I have ~~offered~~ spec. to
appear the app for the 4/10
MEL*

Affidavit of Nathaniel Hayes in Support of Order To
Show Cause Sworn to April 9, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
EDWARD L. KIRKLAND, et al.,

Plaintiffs,

vs.

NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants.
-----x

:
:
: AFFIDAVIT OF
: NATHANIEL HAYES IN
: SUPPORT OF APPLI-
: CATION FOR TEMPORARY
: RESTRAINING ORDER AND
: PRELIMINARY IN-
: JUNCTION
:
:
:
:-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Nathaniel Hayes, being duly sworn, deposes and says:

1. I began work at the Ossining facility of the New York State Department of Correctional Services (commonly known as "Sing Sing") in April 1961 as a Correction Officer. I occupied that position until August, 1972, for a period of 11 years, 4 months.

2. Supervisors periodically rate the performance of Department personnel as either "satisfactory" or "unsatisfactory."

During the period that I was a Correction Officer, I received only "satisfactory" ratings.

3. From 1964 through 1966 I attended Westchester Community College in Valhalla, New York, taking an evening course in Correction Administration which included English, Sociology, Psychology, Correction Law and Criminology. I accumulated 30 credits.

4. In 1964 I was sent by the Department to St. Lawrence University, where I took and received a certificate for completing a course in Delinquency and Crime.

5. During the period that I was a Correction Officer, I was involved in counselling with the inmate population. In 1972 I was selected by the Department of Correctional Services to be a Counselor and Lecturer in a training program for the Department's

first class of minority recruits to be trained at the New York State Troopers Academy in Albany, New York. The program lasted for 13 weeks, and its graduates were sent to Attica Prison to work.

6. I also attended the Law Enforcement Officers Training School given by the Federal Bureau of Investigation at Camp Smith in Peekskill, New York. I completed a Defensive Tactics course in May 1972 and a Police Defensive Tactics Instructors course in December 1972.

7. In August 1972, I, along with other Correction Officers, black and white, was chosen by the Superintendent of the Ossining facility, Theodore Schubin, to work as a Provisional Correction Sergeant. Since that time I have performed the duties and received the pay of a Correction Sergeant.

8. From August 1972 to October 1972 I worked as a Provisional Correction Sergeant at Ossining. In October I was asked by the Captain-in-Charge of the Training Academy to return to Albany and work in the training program. I accepted.

9. During my period of service in the Department, I have taken the examination for promotion to Correction Sergeant three

times, in or about 1965, 1968 and 1972. Each time I have failed to receive a passing score.

10. The last examination was held on October 14, 1972. The eligible list based on that examination was not established until March 15, 1973.

11. 1,435 men took the 1972 examination. 406 passed, of whom 6 were Black and none were Hispanic. The highest grade received was 89.3 including Veterans' Credits. I received my failure notice on March 16, 1973. My final grade was 64.

12. On April 4, 1973 my supervisor, Correction Captain Hyland Sperbeck, called me into his office and told me that on April 12 the Department will appoint 90 Correction Sergeants off the eligible list and that my provisional appointment to the position of Correction Sergeant will be terminated at that time.

- 2 -

13. Captain Sperbeck further told me that I would have to consider either returning to Ossining or continuing to work at the Training Academy, but if I desired to stay at the Academy I would have to submit a resume.

14. I have also learned that as a consequence of my having accepted the provisional appointment to the position of Correction Sergeant, when I revert to the position of Correction Officer I may lose the seniority which I previously acquired and will be in a less advantageous position than I was in before with respect to assignments.

William R. Hays

Sworn to before me this
9th day of April, 1973.

Glenn A. Jones

Notary Public
Commission Expires 12/31/74

Affidavit of Edward L. Kirkland in Support of
Order To Show Cause Sworn to April 4, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x	
EDWARD L. KIRKLAND, et al.,	: AFFIDAVIT OF EDWARD L.
	: KIRKLAND IN SUPPORT
Plaintiffs,	: OF PLAINTIFFS' APPLI-
	: CATION FOR A TEMPORARY
vs.	: RESTRAINING ORDER AND
	: A PRELIMINARY IN-
	: JUNCTION
NEW YORK STATE DEPARTMENT OF	:
CORRECTIONAL SERVICES, et al.,	:
	:
Defendants.	: .
	:
-----x	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Edward L. Kirkland, being duly sworn, deposes and says:

1. I am presently employed by the New York State Department of Correctional Services, at the State Correctional Facility at Ossining, New York, in the position of provisional Correction Sergeant. I was appointed to that position on August 25, 1972, and had previously served as a Correction Officer with the Department since my appointment on July 18,

1961.

2. I am Black.

3. The selection of Correction Officers to serve as Provisional Sergeants was made by the Commissioner of the State Department / on the basis of recommendations of the officers' superiors, and represented their combined judgment that the persons so appointed were the most competent to perform the job.

4. As provisional Correction Sergeant it has been my responsibility to direct and supervise the work of Correction Officers.

5. The Department gives ratings of job performance to all personnel semi-annually as satisfactory or unsatisfactory. I have received one rating of "satisfactory" as Correction Sergeant, and my ratings as a Correction Officer for eleven

years were uniformly satisfactory.

6. I have taken examinations for the position of Correction Sergeant on all occasions on which it has been given since I became eligible; in or about 1965, in 1968, and on October 14, 1972. On each occasion I was notified that I had received a failing score.

7. Following the closing of applications for the last Correction Sergeant examination, but before the test was given, I received a form from the Civil Service Commission on which I was to fill in my race and ethnic origin, along with my social security number, which is used for identification on the test. I filled out and returned the form. I believe that such forms were sent to all test applicants and returned when completed to the Department of Civil Service.

8. Within a week after the administration of the 1972 examination, officially designated as number 34944, I went to the offices of the Civil Service Commission in New York City, where I was shown a copy of the examination. I "took" the

test again at the offices, giving, to the best of my recollection, the same answers I had given when I took it officially. I compared my answers with the official scoring key, and found that my score was eighty-six (86). When notified by the Commission that I had failed, I was told that my score was sixty-five (65).

9. On March 16, 1973 I received notice of my score. On March 17, I sent a registered letter to the offices of the Civil Service Commission requesting that I be permitted to examine my test paper and answers. Although the receipt was returned by the Postal Service, the letter has not been answered.

10. On the basis of my experience as a Correction Officer and provisional Correction Sergeant, I consider that many of the questions on examination 34944 were unrelated to the work or to knowledge required to perform the work of a Correction

Sergeant. On several questions, the official "correct" answer provided by the Department of Civil Service was in conflict with the regulations and established practices of the Department of Correctional Services.

11. The notification of examination results and the official eligibility list are dated March 15, 1973, five months after the test was given. In my experience as a New York State employee, eligibility lists are normally promulgated within one to two months after a test is given.

12. Placement on an eligibility list for Correction Sergeant is based solely on examination scores and veterans preference points. No other factor, such as performance ratings, seniority, or the like are considered.

13. As a result of the promulgation of the eligibility list and my having been given a failing score, persons on the list will be given permanent appointments to the rank of Correction Sergeant and I will lose my provisional appointment and will revert to the position of Correction Officer, with resulting loss of salary, responsibility and status. Further,

as a result of my having accepted the provisional appointment, I have been advised that I will lose certain seniority rights, including the opportunity to be returned to my last assignment as a Correction Officer, which I had obtained through my seniority in that rank.

14. On the basis of past practice, another examination for Correction Sergeant will not be given for at least three years. If the present list is permitted to stand, I will not again be able to seek promotion until that test is given.

15. As a result of my position as President of the Brotherhood of New York State Correctional Officers, and my personal interest, I have become familiar with the statistics on minority employment in the New York State Correctional System. As of January, 1973, there were 413 white male Correctional Sergeants throughout the system, but only 13

Black and one Hispanic Sergeants. Moreover, only two of the Blacks have permanent appointments. The others were selected by their superintendents to act on a provisional basis, and all will be returned to the rank of officer if the ninety appointments are made from the eligible list. Moreover, while about 200 of those who took the examination were Black or Hispanic, only six of those with passing scores are Black, and only one has a score high enough to be eligible for promotion to the presently existing vacancies.

16. Of the 341 Black Correction Officers (Male) in the state correctional system, over 200 work at Ossining, where Blacks constitute a majority of the correction officers. The other correctional facilities have very few Black officers, and many of those were hired within the last eighteen months. Although most of those eligible at Ossining took examination 34944, a smaller percentage of officers at Ossining passed the test than at most other facilities.

Richard L. Stuland

Sworn to before me this
14 day of April, 1973.

William J. Jones

Affidavit of Deborah M. Greenberg In Support Of
Order To Show Cause Sworn to April 10, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
EDWARD L. KIRKLAND, et al.,

Plaintiffs,

vs.

NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants.
-----X

:
: AFFIDAVIT OF DEBORAH
: M. GREENBERG IN SUP-
: PORT OF PLAINTIFFS'
: APPLICATION FOR A
: TEMPORARY RESTRAINING
: ORDER AND A PRELIMI-
: NARY INJUNCTION

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

Deborah M. Greenberg, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York and this Court and an attorney for plaintiffs herein. I make this affidavit in support of plaintiffs' application for the issuance of a Temporary Restraining Order and a Preliminary Injunction enjoining and restraining defendants from making appointments to the position of Correction Sergeant (Male) and from terminating or otherwise interfering with the provisional

appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants (Male).

2. The New York State Department of Correctional Services is about to appoint ninety persons to the position of Correction Sergeants (Male) in the Department of Correctional Services. These appointments are to be made from an eligibility list established March 15, 1973 on the basis of a promotional examination, number 34944, held on October 14, 1972.

3. Plaintiffs Edward L. Kirkland and Nathaniel Hayes, both of whom are Black, were provisionally appointed to the position of Correction Sergeant (Male) in August, 1972. All provisional appointments to the position of Correction Sergeant (Male) will be terminated when the permanent appointments are made. Plaintiffs Kirkland and Hayes, and nine other Black men, comprising

all of the Blacks and Hispanics holding provisional appointments to the position of Correction Sergeant (Male), will revert to the position of Correction Officer (Male).

4. Of the ninety men about to be appointed to the position of Correction Sergeant, only one is Black and none are Hispanic.

5. Of the 427 men presently holding permanent^{or provisional}/appointments to the position of Correction Sergeant, 13 are Black and one is Hispanic.

6. Examination number 34944 had a grossly disparate impact on Blacks and Hispanics as compared to white. 1435 men took the examination. Upon information and belief, of these approximately 200 were Black or Hispanic and 1,235 were white. 406 men received a passing score of 70, of whom 6 were Black, none were Hispanic, and 400 were white. Thus, only 3% of the Blacks and Hispanics who took the examination passed, while over 32% of the whites who took the examination passed.

7. Plaintiffs Kirkland and Hayes have received satisfactory ratings for their performance of the Sergeant job. Upon infor-

mation and belief, all of the other Black provisional Correction Sergeants (Male) have also consistently received satisfactory ratings from their supervisors.

8. On information and belief, the challenged examination is similar in nature to other written civil service examinations which have been closely scrutinized by this and other federal courts and have been held by those courts to violate rights protected by 42 U.S.C. §§ 1981 and 1983 and the due process and equal protection clauses of the Constitution, see, e.g., Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), aff'g. 330 F. Supp. 203 (S.D.N.Y. 1971) and other cases cited in the accompanying memorandum.

9. As more fully appears from the affidavit of plaintiffs Kirkland and Hayes, some of the answers contained in the key to examination number 34944 were contrary to the rules and

standard practices of the Department of Correctional Services.

10. As more fully appears from the affidavit of plaintiff Kirkland, he requested but was not granted permission to see his examination. He did, however, within five days after taking the examination, administer the examination to himself at the office of the Department of Civil Service in New York City. A comparison of his answers to the key showed that he had scored 86. On March 15, 1973 he was notified by the Civil Service Commission that he had failed the examination, with a score of 65.

11. Plaintiffs and their class will suffer irreparable damage if the requested temporary restraining order and preliminary injunction are not issued. If defendants are permitted to make ninety appointments from the eligible list prepared on the basis of examination number 34944, the present gross racial and ethnic imbalance in the position of Correction Sergeant (Male) will be perpetuated. Minorities comprise only 3.3% of the 427 Correction Sergeants (Male), and there is only one minority prospective appointee among the 90 about to be appointed.

12. The appointment of 90 Correction Sergeants (Male) from the examination number 34944 eligible list would restrict the ability of the Court to remedy the underrepresentation of minorities should the Court find that such relief is appropriate, and Plaintiffs would have to face the reality of no appointments because of lack of available openings. We submit that the Court should preserve its ability to grant relief with respect to the eligible list in its entirety, since the invalidity of the entire list - not just part of it - will be established if plaintiffs prove at trial that examination number 34944 was unlawfully discriminatory.

13. Further, if defendants are permitted to make appointments from the existing eligible list, plaintiffs Kirkland and Hayes would be removed from the position of provisional Correction

Sergeant and would revert to the position of Correction Officer. As more fully stated in the affidavits of both named plaintiffs not only would they suffer a substantial reduction in pay, but also they would be compelled to seek vacant assignments not presently filled or desired by other Correction Officers, without regard to their relative seniority as Correction Officers earned prior to their provisional appointments.

14. With respect to the requirement that plaintiffs show a reasonable probability of success in the final outcome of this litigation, I believe that the facts sworn to in the affidavits of plaintiffs demonstrate beyond cavil that they shall succeed. Our accompanying memorandum of law demonstrates that the overwhelming weight of the law is on their side.

15. Plaintiffs respectfully request that this Court waive the requirement that they post security. Plaintiffs are persons of modest means and do not have sufficient assets to be able to purchase a bond of any significant amount.

16. This motion is brought on by Order to Show Cause rather than by Notice of Motion because defendants have not yet appeared

and because of the need for prompt injunctive relief to prevent irreparable damage to plaintiffs.

17. On April 10, 1973 at 11:05 A.M. I telephoned the office of the Attorney General of the State of New York at 80 Centre Street, New York, New York and informed Mrs. Reaver Walker, secretary in the Litigation Bureau, that an application for a Temporary Restraining Order would be made on April 10, 1973. Mrs. Walker told me that she customarily received notices of such applications, that she would immediately notify Mr. Joel Lewittes, Assistant Attorney General in charge of the Litigation Bureau, and that he would assign an attorney to meet me in the office of the Clerk of this Court at 2 P.M.

18. On April 10, 1973, at 11:20 A.M. I telephoned the

office of the Department of Civil Service of the State of New York at 1350 Avenue of the Americas and informed Mr. Travis J. Sullivan, Associate Attorney, that an application for a Temporary Restraining Order would be made at about 2 P.M. on April 10, 1973.

19. On April 10, 1973 at 11:15 A.M. I telephoned the office of the New York State Department of Correctional Services at Albany, New York, and informed Mr. Victor Zuckerman, First Assistant Counsel, that an application for a Temporary Restraining Order would be made at about 2 P.M. on April 10, 1973.

20. No prior application has been made for the relief sought in this application.

Victor Zuckerman

Sworn to before me this
10th day of April, 1973.

George H. [unclear]

Notary Public

Commission Expires

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
EDWARD L. KIRKLAND, et al., :
 :
 : Plaintiffs, : M.E.L.
 :
 vs. : No. 73 Civ. 1548
 :
 THE NEW YORK STATE DEPARTMENT OF :
 CORRECTIONAL SERVICES, et al., :
 :
 : Defendants. : AFFIDAVIT OF
 : SERVICE
----- x

DEBORAH M. GREENBERG, being duly sworn, deposes and
says:

1. On April 10, 1973 at 4:50 P.M. Judge Morris E. Lasker signed an Order to Show Cause in the above styled case wherein he ordered that personal service of copies of said Order to Show Cause and supporting papers therein on the defendants would be sufficient if made upon the Attorney General of the State of New York by the attorneys for plaintiffs on or before the 10th day of April, 1973 at 5:00 P.M.
2. I served copies of the Summons and Complaint, Order to Show Cause and supporting affidavits, Request for Production of Documents and Memorandum in Support of Plaintiffs' Application for a Temporary Restraining Order and for the Issuance of a Preliminary Injunction upon Stanley Kantor, Deputy Assistant Attorney General of the State of New York at approximately 2:30 P.M. on April 10, 1973 in the office of the Clerk of the United States District Court for the Southern District of New York. Said Order to Show Cause was signed by Judge Lasker in the presence of Mr. Kantor.
3. On April 11, 1973 at 4:50 P.M., Judge Lasker signed an Order supplementing the Temporary Restraining Order entered on April 10. I personally served Mr. Kantor with a copy of said

order at approximately 4:45 P.M. on April 11, 1973 in Judge Lasker's chambers and Mr. Kantor was present when said order was signed.

4. At the time Judge Lasker entered said supplementary order, counsel for defendants objected to the manner of service upon defendants. I stated that I had made personal service upon Mr. Kantor as stated above, and that I would serve a complete set of papers on each of the named defendants by mail on April 12, 1973. Judge Lasker indicated that this would be sufficient service.

5. On April 12, 1973 I served copies of the Summons and Complaint, Order to Show Cause and supporting affidavits, supplemental Order, Request for Production of Documents, and Memorandum in Support of Plaintiffs' Application for a Temporary Restraining Order via United States Mail upon the following:

The New York State Department of
Correctional Services,
State Campus
Albany, New York.

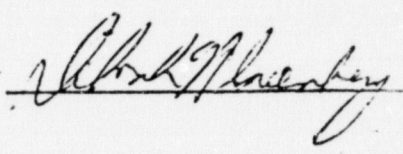
Russell Oswald
Commissioner of the New York State
Department of Correctional Services
State Campus
Albany, New York.

The New York State Civil Service Commission
State Campus
Albany, New York.

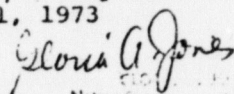
Ersa Poston
President of the New York State Civil
Service Commission and Civil Service
Commissioner
State Campus
Albany, New York.

Michael N. Scelsi
Civil Service Commissioner
State Campus
Albany, New York.

Charles F. Stockmeister
Civil Service Commissioner
State Campus
Albany, New York.



Sworn to before me
this 3rd day of
April, 1973


Gloria A. Jones
Notary Public
County of Albany
Commission Expires 12/31/75

A-60

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
EDWARD L. KIRKLAND, et al., :
 Plaintiffs, : Judge Wyatt
 vs. :
THE NEW YORK STATE DEPARTMENT OF : No. 73 Civ. 1548
CORRECTIONAL SERVICES, et al., :
 Defendants. : ORDER
----- x

Whereas, this Court entered on April 10, 1973 at 4:50 P.M. in the presence of counsel for defendants a Temporary Restraining Order restraining defendants from "making any permanent appointments to the position of Correction Sergeant (Male); and from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants (Male)", said Restraining Order to expire at 5:00 P.M. on April 12, 1973; and

Whereas, this Court entered on April 11, 1973 at

10:00 A.M., in the presence of counsel for defendants, a modification of said Restraining Order, extending same until 5:00 P.M.. April 20, 1973; and

Whereas, the Court is now informed by the parties that defendants have notified in writing a substantial number of persons on the Eligible List for the Correction Sergeant position that they would be appointed to that position effective April 12, 1973; and that based upon this notification a large number of employees of the Department of Correctional Services have already begun to move to their new positions, at expense to them or the State; and

Whereas, the Court is informed that plaintiffs and those members of the class who are presently provisional Correction Sergeants have this date been notified in writing that they will become Correction Officers, effective April 12, 1973, thereby

being displaced from their present provisional positions; and

Whereas, it is the Court's judgment that effectuation of the appointments due to take effect on April 12, 1973, would contravene the Court's Temporary Restraining Order; and

Whereas, it is also the Court's judgment that Court action which prevents the movement of persons that has already begun or which prevents the assumption by persons on the Eligible List of the duties of Correction Sergeant (Male) on some basis would potentially impair the discharge by defendants of their obligations under state law and would impose unnecessary expense and inconvenience upon the State and numerous individuals; and

Whereas, the Order set forth below will effectively preserve the interests of all parties pendente lite, will not compromise the efficient functioning of the correctional facilities involved, and will not cause undue burden, prejudice, or loss to persons on the Eligible List;

THEREFORE, it is hereby ORDERED that:

1. The Court's Temporary Restraining Order restraining

defendants from making permanent appointments to the Correction Sergeant position will remain in effect.

2. The aforesaid Order shall be understood not to restrain or prevent defendants from giving Provisional effect to the appointments scheduled to take effect on April 12, 1973, subject to the provisions of the following paragraph, pending adjudication of the merits by the Court at such early time as it may consider this matter further.

3. The defendants shall administer and conduct the reassignment of personnel pursuant to the appointments scheduled to take effect on April 12, 1973, in such a manner as to comply with the provision of the Court's Temporary Restraining Order restraining them from "terminating or otherwise interfering with the provisions" appointments of the named plaintiffs and those members of the class.

who are provisional Correction Sergeants (Male)." This provision shall be understood to restrain defendants from giving present effect to the notice that plaintiffs and those class members who are provisional Correction Sergeants will be appointed Correction Officers effective April 12, 1973, thereby displacing them from their present provisional positions.

4. The parties shall endeavor to agree upon a list, by name and location of facility, of all class members who now occupy the Correction Sergeants (Male) position on a provisional basis. This list shall be prepared and submitted to the Court no later than 5:00 P.M., April 16, 1973.

This Order clarifies and supplements the Temporary Restraining Order previously entered by the Court.

SO ORDERED.

MEL

U.S.D.J.

Dated: April 11, 1973 at 4:50 P.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

4/11

----- x
EDWARD L. KIRKLAND, et al., :
Plaintiffs, : Judge Wyatt
vs. :
THE NEW YORK STATE DEPARTMENT OF : No. 73 Civ. 1548
CORRECTIONAL SERVICES, et al., :
Defendants. : ORDER
----- x

Whereas, this Court entered on April 10, 1973 at 4:50 P.M. in the presence of counsel for defendants a Temporary Restraining Order restraining defendants from "making any permanent appointments to the position of Correction Sergeant (Male); and from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants (Male)", said Restraining Order to expire at 5:00 P.M. on April 12, 1973; and

Whereas, this Court entered on April 11, 1973 at 10:00 A.M., in the presence of counsel for defendants, a modification of said Restraining Order, extending same until 5:00 P.M., April 20, 1973; and

Whereas, the Court is now informed by the parties that defendants have notified in writing a substantial number of persons on the Eligible List for the Correction Sergeant position that they would be appointed to that position effective April 12, 1973; and that based upon this notification a large number of employees of the Department of Correctional Services have already begun to move to their new positions, at expense to them or the State; and

Whereas, the Court is informed that plaintiffs and those members of the class who are presently provisional Correction Sergeants have this date been notified in writing that they will become Correction Officers, effective April 12, 1973, thereby

being displaced from their present provisional positions; and
Whereas, it is the Court's judgment that effectuation of the appointments due to take effect on April 12, 1973, would contravene the Court's Temporary Restraining Order; and

Whereas, it is also the Court's judgment that Court action which prevents the movement of persons that has already begun or which prevents the assumption by persons on the Eligible List of the duties of Correction Sergeant (Male) on some basis would potentially impair the discharge by defendants of their obligations under state law and would impose unnecessary expense and inconvenience upon the State and numerous individuals; and

Whereas, the Order set forth below will effectively preserve the interests of all parties pendente lite, will not compromise the efficient functioning of the correctional facilities involved, and will not cause undue burden, prejudice, or loss to persons on the Eligible List;

THEREFORE, it is hereby ORDERED that:

1. The Court's Temporary Restraining Order restraining defendants from making permanent appointments to the Correction Sergeant position will remain in effect.
2. The aforesaid Order shall be understood not to restrain or prevent defendants from giving Provisional effect to the appointments scheduled to take effect on April 12, 1973, subject to the provisions of the following paragraph, pending adjudication of the merits by the Court at such early time as it may consider this matter further.
3. The defendants shall administer and conduct the reassignment of personnel pursuant to the appointments scheduled to take effect on April 12, 1973, in such a manner as to comply with the provision of the Court's Temporary Restraining Order restraining them from "terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class

who are provisional Correction Sergeants (Male)." This provision shall be understood to restrain defendants from giving present effect to the notice that plaintiffs and those class members who are provisional Correction Sergeants will be appointed Correction Officers effective April 12, 1973, thereby displacing them from their present provisional positions."

4. The parties shall endeavor to agree upon a list, by name and location of facility, of all class members who now occupy the Correction Sergeants (Male) position on a provisional basis. This list shall be prepared and submitted to the Court no later than 5:00 P.M., April 16, 1973.

This Order clarifies and supplements the Temporary Restraining Order previously entered by the Court.

SO ORDERED.

MEL
U.S.D.J.

Dated: April 11, 1973 at 4⁵⁰ P.M.

STIPULATION EXTENDING TEMPORARY RESTRAINING ORDER
DATED APRIL 18, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
EDWARD L. KIRKLAND, et al., :
Plaintiffs, : M.E.L.
vs. :
THE NEW YORK STATE DEPARTMENT OF : No. 73 Civ. 1548
CORRECTIONAL SERVICES, et al., :
Defendants. : STIPULATION
----- x

Whereas, this Court entered on April 10, 1973 at 4:50 P.M. in the presence of counsel for defendants, a Temporary Restraining Order restraining defendants from "making any permanent appointments to the position of Correction Sergeant (Male); and from terminating or otherwise interfering with the previous appointments of the named plaintiffs and those members of the

class who are provisional Correction Sergeants (Male)", said
Restraining Order to expire at 5:00 P.M. on April 12, 1973; and

Whereas, this Court entered on April 11, 1973 at
10:00 A.M., in the presence of counsel for defendants, a modifi-
cation of said Restraining Order, extending same until 5:00 P.M.,
April 20, 1973; and

Whereas, this Court entered on April 11, 1973 at
4:50 P.M., in the presence of counsel for defendants, an Order
clarifying and supplementing aforesaid Temporary Restraining
Order by ordering that:

1. The Court's Temporary Restraining Order
restraining defendants from making permanent ap-
pointments to the Correction Sergeant position
will remain in effect.

2. The aforesaid Temporary Restraining
Order shall be understood not to restrain or
prevent defendants from giving provisional effect

to the appointments scheduled to take effect on April 12, 1973, subject to the provision of the following paragraph, pending adjudication of the merits by the Court at such early time as it may consider this matter further.

3. The defendants shall administer and conduct the reassignment of personnel pursuant to the appointments scheduled to take effect on April 12, 1973, in such a manner as to comply with the provision of the Court's Temporary Restraining Order restraining them from "terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants (Male)." This provision shall be understood to restrain defendants from giving present effect to the notice that plaintiffs and those class

ONLY COPY AVAILABLE

members who are provisional Correction Sergeants will be appointed Correction Officers effective April 12, 1973, thereby displacing them from their present provisional positions.

4. The parties shall endeavor to agree upon a list, by name and location of facility, of all class members who now occupy the Correction Sergeants (Male) position on a provisional basis. This list shall be prepared and submitted to the Court no later than 5.00 p.m., April 16, 1973;" and


Whereas, the Hon. Morris H. Lasker set the matter down for a trial on the merits commencing June 18, 1973; and

Whereas, the parties believe that the interests of justice will best be served by consolidating the hearing on plaintiffs' application for a preliminary injunction with the

trial of the action on the merits; it is hereby

STIPULATED by and between all the parties by their respective counsel that the aforesaid Temporary Restraining Order and supplemental Order shall be extended and remain in effect until such time as this Court enters its decision on the merits or earlier rules on plaintiffs' application for a preliminary injunction.

Dated: April 17, 1973



JACK GREENBERG
JEFFRY A. MINIZ
MORRIS J. ELLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR PLAINTIFFS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York.
SEYMOUR KAHN
Deputy Assistant Attorney
General
80 Centre Street
New York, New York 10013

ATTORNEYS FOR DEFENDANTS

So Ordered April , 1973 at

United States District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

EDWARD L. KIRKLAND, et al., :

Plaintiffs, :

-against- :

THE NEW YORK STATE DEPARTMENT OF:
CORRECTIONAL SERVICES, et al.,

Defendants. :

-----X

NOTICE OF MOTION

73 Civ. 1548 MEL

S I R S :

PLEASE TAKE NOTICE that the undersigned will move
this Court, at a term thereof for the hearing of motions to
be held before the Honorable Morris E. Lasker, at the United
States Courthouse, Foley Square, New York, New York, on the
14th day of May, 1973, at 10:00 o'clock in the forenoon or
as soon thereafter as counsel can be heard for an order, pur-

suant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, dismissing the complaint herein for improper venue and pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure dismissing the complaint for improper service, and for such other, further and different relief that, as to this Court may seem just and proper.

Dated: New York, New York
May 4, 1973

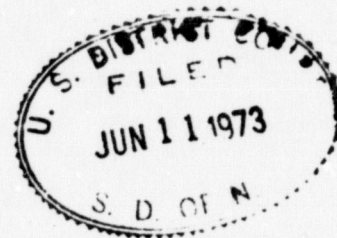
Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

STANLEY L. KANTOR
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Office & P.O. Address
80 Centre Street
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To: JACK GREENBERG, ESQ.
DEBORAH GREENBERG, ESQ.
JEFFREY MINTZ, ESQ.
MORRIS BA'LER, ESQ.
Attorneys for Plaintiffs
10 Columbus Circle
New York, New York 10017

Memorandum and Order on Defendants' Motion to Dismiss
And/or Transfer Dated June 7, 1973



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

v.

73 Civ. 1548

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

MEMORANDUM

Defendants.
-----X

APPEARANCES:

JACK GREENBERG, ESQ.
JEFFERY A. MINTZ, ESQ.
DEBORAH M. GREENBERG, ESQ.
MORRIS J. BALTER, ESQ.
10 Columbus Circle
New York, New York 10019
Attorneys for Plaintiffs

LOUIS J. LEERONITZ, ESQ.
Attorney General of the State of New York
80 Centre Street
New York, New York 10013
Attorney for Defendants

IRVING GALT, ESQ.
Assistant Attorney General

STANLEY L. KANTOR, ESQ.
Deputy Assistant Attorney General
of Counsel

LASKER, D.J.

Defendants have moved to dismiss for improper venue, or, in the alternative, for a transfer of venue to the Northern District of New York. Defendants reside in the Northern, Eastern and Southern Districts of New York. Since jurisdiction is not predicated on diversity of citizenship, venue is governed by 28 U.S.C. §1391(b) or, since defendants all reside in New York State, by 28 U.S.C. §1392(a).

The former section provides that "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." 28 U.S.C. §1391(b). The latter states: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." 28 U.S.C. §1392(a). Defendants contend that the former section governs this case; plaintiffs rely on the latter.^{1/}

Defendants urge us to disregard the clear language of §1392(a), because they see a conflict between the two sections, the proper resolution of which, they

argue, requires the application of §1391(b). Concededly, §1392(a) is an exception to §1391(b) and by definition, therefore, differs from it. It was "intended to do away with the insertion of special provisions preserving statewide venue in acts dividing a state into two or more judicial districts." Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561, 566 (1942) (footnote omitted). However, defendants argue that, since its primary purpose is to relieve plaintiffs of the burden of bringing multiple suits against defendants who reside in the same state, it should only apply if there is no district under the general venue provision in which all defendants are amenable to suit. ^{2/} The cause of action having arisen, according to defendants, ^{3/} in the Northern District, they argue that that district provides a forum in which all defendants could be sued under §1391(b) and, accordingly, that §1392(a) is inapplicable.

The difficulty with this position is two-fold. First, there simply is nothing in the Code which supports it, and in the face of §1392(a)'s absolutely unambiguous language, we are hesitant to second-guess Congress in this manner. Second, taken to its logical extreme, defendants' interpretation would altogether nullify §1392(a).

Since the amendment to §1391(b) in 1966 to allow suit in a district "in which the claim arose," there will always be a district in which all defendants are amenable to suit. Accordingly, if defendants are correct that §1392(a) only applies when §1391(b) does not provide a forum where all defendants can be sued, then §1392(a) would have been, in effect, repealed by the 1966 amendment. We find no basis for believing -- and defendants have cited no authority -- that Congress intended to repeal §1392(a) in such a backhanded manner.

Defendants seek, alternatively to dismissal, to have the case transferred to the Northern District pursuant to 28 U.S.C. §1404(a). We do not think that the facts which have been presented to us justify such a move. Plaintiffs reside in the Eastern and Southern Districts. Most members of plaintiffs' proposed class reside or are employed in the Southern District. Although some individual defendants reside in the Northern and Western Districts, their active personal participation in the case will be nominal or nonexistent. The state agencies which are sued have offices in New York City and the Department of Correctional Services operates correctional facilities in the Southern District. In view of the above, the fact that some inconvenience

to defendants may result from suit here (for example, certain records will have to be brought from Albany) does not justify overriding the preference which must be accorded plaintiffs' choice of venue. See Levin v. Mississippi River Corp., 289 F. Supp. 353, 359-60 (S.D.N.Y. 1968).

Accordingly, defendants' motion to dismiss or transfer is denied.

It is so ordered.

Dated: New York, New York
June 7th, 1973.

Murray T. Eisen

U.S.D.J.

FOOTNOTES

1. Plaintiffs also contend that defendants have waived their objection to venue. Defendants claim that there is no waiver, because service upon them was improper and their time to answer or move has not yet begun to run. We believe that defendants' position is correct and ordinarily would order that they be reserved, the action to continue without abatement. We will not do so here, however, since the Attorney General, who represents defendants, has indicated that, as long as their objection to venue (which we have decided on the merits) is preserved, defendants do not seek to oblige plaintiffs to serve them anew. The Attorney General has also stated that he cannot waive personal service on state officials to the extent that they are sued individually. Since recovery against them individually is virtually inconceivable, personal service on them appears to us unnecessary.
2. Defendants rely heavily for this point, and for general support of their proposed reconciliation of §1391(b) and 1392(a), on Hawks v. Maryland & P. R. Co., 90 F. Supp. 284 (E.D. Pa. 1950) and Lo George v. Mandata Poultry Co., 196 F. Supp. 192 (E.D. Pa. 1961). The former supports their position but the latter, a later case from the same district, is to the contrary, allowing venue to be laid under §1392(a), despite the availability of a single forum under §1391(a).
3. We are far less confident than defendants that the cause of action in fact arose in the Northern District. However, in view of the applicability of §1392(a), it is unnecessary to discuss this problem further.

PLAINTIFFS' NOTICE OF MOTION FOR CLASS ACTION DETERMINATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x

EDWARD L. KIRKLAND, et al., :
 :
 Plaintiffs, :
 :
 vs. : M. E. L.
 :
 THE NEW YORK STATE DEPARTMENT OF : 73 Civ. 1548
 CORRECTIONAL SERVICES, et al., :
 :
 Defendants.

NOTICE FOR MOTION AND MOTION
FOR CLASS ACTION DETERMINATION

PLEASE TAKE NOTICE that the undersigned will submit to Judge Morris E. Lasker, At Room 2903, United States Courthouse, Foley Square, City of New York on the 25th day of June, 1973, at 10:00 A.M. in the forenoon of that day a motion for an order pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and

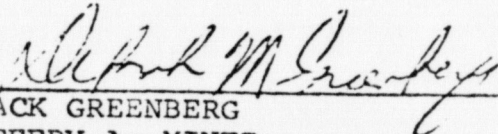
Rule 11A(c) of this Court:

1. Permitting this action to be maintained as a class action;

2. Defining the class as

"a) all those Black and Hispanic persons presently employed by the New York State Department of Correctional Services as permanently appointed Correction Officers (Male) or provisionally appointed Correction Sergeants (Male) who took Civil Service examination number 34944 for permanent appointment to the position of Correction Sergeant (Male) but by virtue of their performance on that examination are not eligible for, or will not be appointed to, the Correction Sergeant position; and

"b) all those Black and Hispanic persons employed by the New York State Department of Correctional Services as permanently appointed Correction Officers (Male), who, as a result of defendants' policy and practice of determining promotions to the Correction Sergeant position on the basis of a written examination of the nature of Civil Service examination number 34944 have been or may be deterred from seeking promotions;" and granting such other and further relief as the Court may deem just and proper.


JACK GREENBERG
JEFFRY A. MINTZ
DEBORAH M. GREENBERG
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR PLAINTIFFS

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Attorney General of the State of New York
IRVING GALT, ESQ.
Assistant Attorney General of the State
of New York
STANLEY KANTOR, ESQ.
Deputy Assistant Attorney General of the
State of New York
80 Centre Street
New York, New York 10013

ATTORNEYS FOR DEFENDANTS.

DEFENDANTS' ANSWER VERIFIED JULY 10, 1973
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EDWARD L. KIRKLAND and NATHANIEL
HAYES, each individually and on behalf
of all others similarly situated,

and

BROTHERHOOD OF NEW YORK STATE
CORRECTION OFFICERS, INC.,

Plaintiffs,

73 Civ. 1548 MEL

-against-

VERIFIED ANSWER

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES;

RUSSELL OSWALD, individually and in
his capacity as Commissioner of the
New York State Department of
Correctional Services;

THE NEW YORK STATE CIVIL SERVICE
COMMISSION;

ERSA POSTON, individually and in her
capacity as President of the New York
State Civil Service Commission and
Civil Service Commissioner;

MICHAEL W. SCHELSI and CHARLES F.
STOCKMEISTER, each individually and
in his capacity as Civil Service
Commissioner,

Defendants.

-----X
Defendants, by their attorney, LOUIS J. LEFKOWITZ,
Attorney General of the State of New York, for their answer
to the complaint herein, and the amendments thereto, respect-
fully allege, upon information and belief:

FIRST: Deny each and every allegation contained in
paragraphs "1", "8", "16", "17C", "21" and "25" of plaintiffs'
complaint;

SECOND: Deny knowledge or information sufficient to
form a belief as to the truth of the allegations contained in
paragraphs "17" and "18" of plaintiffs' complaint;

THIRD: Deny so much of paragraph "2" of plaintiffs' complaint, as alleges that plaintiffs may properly maintain the instant action as a class action.

FOURTH: Deny so much of paragraph "2" of plaintiffs' complaint as alleges or implies that named plaintiffs are properly representative of a purported class that includes hispanic correction officers.

FIFTH: Deny so much of paragraph "2" of plaintiffs' complaint as alleges or implies that plaintiffs are properly representative of a purported class of black employees who took examination 34-944, and passed said examination.

SIXTH: Deny so much of paragraph "2" of plaintiffs' complaint as alleges or implies that plaintiffs are proper representatives of a purported class of black employees who took and failed examination 34-944.

SEVENTH: Deny so much of paragraph "2(c)" of plaintiffs' complaint as alleges that there are 200 persons in what purports to be category (i), and further deny so much of said paragraph as alleges that there are 240 persons in what purports to be category (ii); and further deny that any such persons properly form a class;

EIGHTH: Deny each and every allegation contained in paragraph "2(d)" of plaintiffs' complaint, except admit that named plaintiffs Kirkland and Hayes have taken promotional examination 34-944 and failed and are as a result of the promulgation of the eligible list no longer entitled to remain in the position of provisional correction sergeant; and

NINTH: Deny knowledge or information sufficient to form a belief as to so much of sub-paragraph "2(d)" of plaintiffs' complaint refers to plaintiffs' counsel's competence or experience.

TENTH: Deny that there are questions of fact common to the class.

ELEVENTH: Deny that there are questions of law common to the purported class.

TWELFTH: Deny so much of paragraph "3" of plaintiffs' complaint as alleges that plaintiff Kirkland's performance as a provisional correctional sergeant has been satisfactory; and that plaintiffs' request to attend an examination review was ignored, and each such allegation;

THIRTEENTH: Deny knowledge or information sufficient to form a belief as to the veracity of much of paragraph "3" of plaintiffs' complaint as alleges that plaintiff Kirkland received his score notification on March 16, 1973;

FOURTEENTH: Admit so much of the allegations of paragraph "3" of plaintiffs' complaint as alleges that Kirkland is a black citizen of the United States, that he resides in Kings County, the State of New York, that he was first appointed a correction officer in July, 1961 and that his employment continues to date; and further admit that Kirkland was appointed a provisional correctional sergeant in August, 1972 and that he remains in that position to date; and further admit that plaintiff Kirkland took and failed examination 34-944, but deny knowledge or information sufficient to form a belief as to the truth of the allegation that said plaintiff has taken any prior promotional examination;

FIFTEENTH: Admit that plaintiff Kirkland's position as a provisional correction sergeant would have been terminated but for the Court's temporary restraining order, on March 12, 1973, as a result of appointments effective that date; and admit that permanent appointments could only be made from the eligible list, but denies that the eligible list defines, without more, who will be appointed correction sergeant and denies knowledge or information sufficient to form a belief as to Kirkland's loss of seniority or bidding rights.

SIXTEENTH: Admit each and every allegation contained in paragraph "4" of plaintiffs' complaint, except deny knowledge or information sufficient to form a belief as to so much of said paragraph as alleges that plaintiff Hayes either took or completed in any fashion any courses or training program; and further deny knowledge or information sufficient to form a belief as to the number of times plaintiff Hayes took a promotional examination from correction officer to correction sergeant or his score on any said examinations; and further deny knowledge or information sufficient to form a belief as to so much of paragraph "4" of plaintiffs' complaint as alleges that plaintiff would have to "reapply" to remain on the staff of the training academy.

SEVENTEENTH: Deny each and every allegation contained in paragraph "5" of plaintiffs' complaint except admits that the Brotherhood is a membership corporation formed in 1963 and that it maintains offices in New York County.

EIGHTEENTH: Denies so much of paragraph "6" of plaintiffs' complaint as alleges that Russell G. Oswald is Commissioner of the Department of Correctional Services, but admit that he was Commissioner during the period during which examination 34-944 was developed, administered and graded.

NINETEENTH: Admit each and every other allegation contained in paragraph "6" of plaintiffs' complaint.

TWENTY: Admit each and every allegation contained in paragraph "7" of plaintiffs' complaint with respect to defendant Poston.

TWENTY-FIRST: Admit so much of paragraph "7" of plaintiffs' complaint as alleges that defendants Soelsi and Stockmeister are members of the Civil Service Commission, but deny each and every other allegation contained in paragraph "7" of plaintiffs' complaint insofar as they related to defendants Soelsi and Stockmeister.

TWENTY-SECOND: Admit that defendants Poston, Soelsi and Stockmeister are members of the Civil Service Commission, but deny each and every other allegation in paragraph "7" of plaintiffs' complaint insofar as it relates to the Civil Service Commission.

TWENTY-THIRD: Deny so much of paragraph "9" of plaintiffs' complaint as alleges or implies that if the provisional appointments of black correction sergeants were terminated no minority correctional sergeants would hold any appointments;

TWENTY-FOURTH: Deny so much of the allegations contained in paragraph "9" as alleges that there are 400 or so persons who are or will be holding the rank of correction sergeant, and each such allegation.

TWENTY-FIFTH: Deny so much of the allegations contained in paragraph "9" of plaintiffs' complaint as alleges or implies that but for the temporary restraining order, only one or two blacks would be in supervisory positions in the Department of Correctional Services, and each such allegation.

TWENTY-SIXTH: Admit each and every other factual allegation contained in paragraph "9" of plaintiffs' complaint but refuse to answer any conclusory allegation such as contained in the first sentence of paragraph "9" and move that, pursuant to Rules 8 and 11, F.R. Civ. P., that said statements be stricken.

TWENTY-SEVENTH: Deny each and every allegation contained in paragraph "10" of plaintiffs' complaint insofar as they relate to defendants Scelsi, Stockmeister and the State Civil Service Commission, and each such allegation, including those relating to said defendants' predecessors in office.

TWENTY-EIGHTH: Admit each and every other allegation in paragraph "10" of plaintiffs' complaint insofar as said complaint relates to defendant Poston, but denies so much of the allegations of the complaint as alleges or implies that the highest score on the examination reflects only the score on the test plus veteran's credits.

TWENTY-NINTH: Admit so much of paragraph "11" of plaintiffs' complaint that alleges that 1435 persons ultimately took examination 34-944, but denies knowledge or information sufficient to form a belief as to so much of the allegations contained in paragraph "11" as attempts to assign a reason why each person who took examination 34-944 took said examination.

THIRTIETH: Deny so much of the allegations contained in paragraph "11" as alleges or implies that 200 black and hispanics took and completed examination 34-944 and that only 5 or 1.0% passed and each such allegation.

THIRTY-FIRST: Deny so much of the allegations contained in paragraph "11", of plaintiffs' complaint as alleges that 30% of the whites who took the examination passed, and that alleges or implies that whites passed examination 34-944 at ten times the rate of black and hispanic candidates; and each such allegation.

THIRTY-SECOND: Deny so much of the allegations contained in paragraph "12" of plaintiffs' complaint as alleges or implies that ranking on the eligible list is determined solely on the basis of the score achieved on said examination, but admit each and every other allegation contained in said paragraph.

THIRTY-THIRD: Admit that the Department of Correctional Services immediately, but for the Court's temporary restraining order, intends to replace each and every provisional sergeant who is either not eligible or reachable for permanent appointment to correction sergeant, as a result of the eligible list promulgated, but denies knowledge or information sufficient to form a belief as to each and every other allegation contained in said paragraph of plaintiffs' complaint.

THIRTY-FOURTH: Deny each and every allegation contained in paragraph "14" of plaintiffs' complaint except admit that, pursuant to New York Civil Service Law, § 65, all provisional appointments to the rank of correction sergeant will be terminated, and those who are not eligible or reachable for appointment will resume their permanent position as correction officers.

THIRTY-FIFTH: Deny each and every allegation contained in paragraph "15" of plaintiffs' complaint, except admit that examination 34-944 was a written, objective-type examination.

THIRTY-SIXTH: Deny each and every allegation contained in paragraph "17A" of plaintiffs' complaint, except admit that defendants Oswald and Poston or their predecessors in office administered written objective-type competitive examinations prior to the examination herein is issue.

THIRTY-SEVENTH: Deny each and every allegation contained in paragraph "17B" of plaintiffs' complaint except admit that defendants Oswald and Poston or their predecessors in office have administered prior written objective-type examinations for the position of correction officer and based appointment to the position of correction officer partially on the results of said examinations, and further admit that in order to qualify to take examination 34-944 an applicant or candidate for promotion must have served at least two (2) years in the correction officer or related titles.

THIRTY-EIGHTH: Deny so much of the allegations contained in paragraph "19" of plaintiffs' complaint as alleges that plaintiffs were not afforded an opportunity to inspect their examination papers to verify the correctness of the scoring thereon.

THIRTY-NINTH: Deny knowledge or information sufficient to form a belief as to the length of time it takes other jurisdictions to process civil service examinations, but admit that the publication of the eligible list for examination 34-944 occurred five months after said examination was given.

FORTIETH: Deny each and every allegation contained in paragraph "22" of plaintiffs' complaint, except admit that the majority of black and hispanic correction officers are employed in the correctional facilities located in the southeastern part of New York State.

FORTY-FIRST: Deny so much of the allegations contained in paragraph "23" of the complaint as alleges or implies that if defendants Poston and the Department of Correctional Services were permitted to make permanent appointment to the position of correction sergeants, such appointments would militate against granting plaintiffs relief for any cause of action they purport to possess, but admit that the appointment of permanent correction sergeants would result in the reversion of those provisional correction sergeants not eligible or currently reachable for permanent appointment to their positions as correction officers.

FORTY-SECOND: Deny so much of the allegations contained in paragraph "24" of the complaint as alleges or implies that black and hispanic persons are, have been or will continue to be grossly underrepresented or excluded from the rank of correction sergeant during the life of the eligible list resulting from examination 34-944, but admit that during the period said eligible list is in existence, appointments to the rank of correction sergeant will be based on said eligible list.

FORTY-THIRD: Deny each and every allegation contained in paragraph "26" of plaintiffs' complaint, except admit that defendant Department of Correctional Services intended, but for this Court's temporary restraining order, to make permanent appointments to the rank of correction sergeant from among those people who took examination 34-944 and were certified to said department as being eligible for promotion.

AS AND FOR A FIRST AFFIRMATIVE
DEFENSE

FORTY-FOURTH: Upon information and belief, plaintiff Brotherhood has not authorized nor consented to the bringing of this action in their name.

FORTY-FIRST: Upon information and belief neither plaintiffs Kirkland nor Hayes are officers of said Brotherhood, nor have they or either of them occupied any office in said Brotherhood at any time subsequent to September 1, 1972.

FORTY-SIXTH: Upon information and belief, neither plaintiff Kirkland nor Hayes are authorized to represent the Brotherhood in any fashion, nor to institute this litigation on its behalf.

FORTY-SEVENTH: Accordingly this action, or purported action, by said Brotherhood is unauthorized void and of no effect.

AS AND FOR A SECOND AFFIRMATIVE
DEFENSE

FORTY-EIGHTH: Plaintiff Brotherhood lacks standing to make the claims alleged in the action.

AS AND FOR A THIRD AFFIRMATIVE
DEFENSE

FORTY-NINTH: Examination 34-944 is a validated examination under appropriate professional standards.

AS AND FOR A FOURTH AFFIRMATIVE
DEFENSE

FIFTIETH: Examination 34-944 is job-related.

AS AND FOR A FIFTH AFFIRMATIVE
DEFENSE

FIFTY-FIRST: The Court lacks jurisdiction over the
subject matter of this action.

AS AND FOR A SIXTH AFFIRMATIVE
DEFENSE

FIFTY-SECOND: Alternatively, in light of the
jurisdiction of the Equal Employment Opportunity Commission,
over the claims alleged, this Court should not exercise its
jurisdiction.

AS AND FOR A SEVENTH AFFIRMATIVE
DEFENSE

FIFTY-THIRD: The complaint fails to state a claim for
which relief can be granted.

AS AND FOR A EIGHTH AFFIRMATIVE
DEFENSE

FIFTY-FOURTH: Alternatively, several portions of the
complaint fail to state claims upon which relief can be granted.

AS AND FOR A NINTH AFFIRMATIVE
DEFENSE

FIFTY-FIFTH: Plaintiffs fail to state a claim for which
relief can be granted against defendants Scelsi and Stockmeister.

AS AND FOR A TENTH AFFIRMATIVE
DEFENSE

FIFTY-SIXTH: This Court lacks jurisdiction over
defendant Poston, Scelsi and Stockmeister insofar as they are
named as defendants in other than their official capacity.

AS AND FOR A ELEVENTH AFFIRMATIVE
DEFENSE

FIFTY-SEVENTH: The complaint in the instant action,
was, on information and belief, filed on April 10, 1973.

FIFTY-EIGHTH: The complaint was, on information and
belief, amended on or about June 22, 1973.

FIFTY-NINTH: No examination to determine eligibles
for promotion to correction sergeant other than examination
34-944 or administered between April 10, 1970 and April 10, 1973.

SIXTIETH: Any inquiry or cause of action that purports
to be based on any examination other than 34-944 is barred by
the operation of the statute of limitations, *which and*
established civil service law and practice.

AS AND FOR A TWELFTH AFFIRMATIVE
DEFENSE

SIXTY-FIRST: Plaintiffs lack standing to assert the
claims of those who failed any examination for the position of
correction officer.

WHEREFORE: Defendants and each of them respectfully
demand judgment:

- A. Denying each and every one of plaintiffs' prayers
for relief and dissolving the temporary restraining order;
- B. Dismissing the complaint herein;
- C. Awarding defendants the cost of this action.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

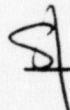
STANLEY L. KANTOR
Deputy Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)


 , being duly-sworn, deposes
and says:

That he is an Assistant Attorney General in the
office of LOUIS J. LEFKOWITZ, Attorney General of the State
of New York, and is duly authorized to make this verification.

That he has read the foregoing and
knows the contents thereof; that the same is true to his own
knowledge, except as to matters therein stated to be alleged
on information and belief, and as to those matters he believes
it to be true.

 _____

Sworn to before me this
day of , 19



Assistant Attorney General
of the State of New York

A-98

PLAINTIFFS' PRE-TRIAL SPECIFICATIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

-against-

M.E.L.
73 Civ. 1548

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants.

-----X

PLAINTIFFS' PRE-TRIAL SPECIFICATION

Plaintiffs hereby submit to defendants their pre-trial specifications of issues for trial, witnesses, and documents to be offered in evidence.

I. STATEMENT OF ISSUES FOR TRIAL

- A. The Court has jurisdiction of the subject matter.
- B. This action meets the requirements of Rule 23 of the Federal Rules of Civil Procedure for maintenance as a class action.
- C. Plaintiffs are adequate and proper representatives of a plaintiff class as defined in the complaint.
- D. There exists a significant under-representation of Black and Hispanic persons in the New York State Civil Service Commission classification of Correction Sergeant (Male) as

compared with the racial and ethnic composition of persons in the New York State Civil Service Commission classification of Correction Officer (Male), (See Plaintiffs' Exhibit 32). This under-representation is the continuation of a long-standing historical pattern.

E. Black and Hispanic persons have been and continue to be effectively excluded from the classification of Correction Sergeant (Male) by the Civil Service examination system maintained and administered by defendants.

1. Civil Service Examination Number 34-944 for promotion to Correction Sergeant (Male) had the effect of disproportionately screening out Blacks Hispanics (See Plaintiffs' Exhibit 33).
2. Past Civil Service examinations for promotion to Correction Sergeant (Male) have had the effect of disproportionately screening out Blacks and Hispanics (See Plaintiffs' Exhibit 31).
3. Past Civil Service examinations for promotion to the classification of Correction Sergeant

have had the effect of deterring Blacks and Hispanics from seeking promotion to the classification of Correction Sergeant.

4. Civil Service examinations for the classification of Correction Officer have had the effect of disproportionately screening out Blacks and Hispanics, thereby contributing to the ultimate exclusion of minorities for the classification of Correction Sergeant.

F. The Civil Service examination system maintained and administered by defendants is neither demonstrably job-related nor necessary.

1. Civil Service Examination Number 34-944 has not been and cannot be shown to bear a demonstrable relationship to successful performance of the job of Correction Sergeant.

- a. The procedures by which the examination was developed were deficient in that no adequate job analysis was conducted.

- b. The examination itself is poorly constructed and not sufficiently related to actual job content.
 - c. The test has not been validated according to the standards of either the American Psychological Association or the Equal Employment Opportunity Commission.
- 2. Previous civil service examinations for promotion to the classification of Correction Sergeant (Male) were similar to Examination Number 34-944 and therefore not demonstrably job-related.
- 3. There are less discriminatory procedures by which persons qualified to perform the job of Correction Sergeant could be selected.
 - a. Persons qualified to perform the job of Correction Sergeant can be selected on the basis of supervisory evaluations of their performance as Correction Officers.
 - b. Plaintiffs and the Black provisional Correction Sergeants they represent are performing satisfactorily as Correction Sergeant.

G. Plaintiffs and many members of the class they represent are fully qualified to perform the job of Correction Sergeant.

H. In light of the past and continuing exclusion of Blacks and Hispanics from the classification of Correction Sergeant (Male), defendants are under a duty to take effective affirmative action to increase minority representation in the classification of Correction Sergeant but have failed to do so.

1. The Civil Service Commission has continued, after the decision in Chance v. Board of Examiners, 458 F. 2d 1167 and the enactment of the Equal Employment Opportunity Act of 1972, to give examinations for the classification of Correction Officer and Correction Sergeant that are racially and ethnically discriminatory in their impact and are not demonstrably job-related.
2. The Department of Correctional Services has taken no steps to increase the representation of minority persons in the classification of Correction Sergeant.

I. In light of the defendants continuing failure to meet their responsibilities as to affirmative action, it is the Court's duty to provide effective affirmative relief, including at least the following:

1. An order requiring defendants to take immediate action toward the development of a non-discriminatory and properly validated selection procedure for appointment to the classification of Correction Sergeant (Male); and
2. An order requiring the immediate appointment of a representative number of Black and Hispanic Correction Sergeants (Male).

J. Plaintiffs are entitled to recover of defendants the costs of this action, including reasonable attorneys' fees.

II. PLAINTIFFS' WITNESSES

A. The persons listed below are named plaintiffs who will testify about their role as representatives of the class, their qualifications, their work experience as Correction Officers and provisional Correction Sergeants, Civil Service examinations for promotion to the classification of Correction Sergeant (Male), and

past and present minority representation in the Department of Correctional Services:

1. Edward L. Kirkland
2. Nathaniel Hayes.

B. The persons listed below are Black provisional Correction Sergeants at Ossining Correctional Facility who took Civil Service Examination Number 34-944 and failed. They will testify about their qualifications, their work experience as Correction Officers and provisional Correction Sergeants, Civil Service Examinations for promotion to the classification of Correction Sergeant (Male), and minority representation in the Department of Correctional Services:

1. James Holman
1500 Noble Avenue
Bronx, New York.
2. Jerry Kimble
8 Ann Street
Peekskill, New York.
3. Arthur Suggs
2175 Lacombe Avenue
Bronx, New York.

C. The person named below is a Black provisional Correction Sergeant at Greenhaven Correctional Facility who took Civil Service Examination Number 34-944 and passed, but scored so low that he is unlikely to be appointed. He will testify about his qualifications, his work experience as a Correction Officer and provisional Correction Sergeant, Civil Service examinations for promotion to

the classification of Correction Sergeant (Male) and minority representation in the Department of Correction Services.

Albert Young
Route 216
Stormville, New York.

D. The persons listed below are Correction Officers, the first at Ossining Correctional Facility and the second at Walkill Correctional Facility, who took Civil Service Examination Number 34-944 and failed. They may testify about their qualifications, their work experience as Correction Officers, Civil Service examinations for promotion to the classification of Correction Sergeant (Male) and minority representation in the Department of Correctional Services.

1. Squire Simpson
33N. Third Avenue
Mt. Vernon, New York.
2. Henry Liburd
P.O. Box 54
Gardiner, New York.

E. The person named below will testify as an expert witness in rebuttal to any evidence presented by defendants as to the job-relatedness of any Civil Service examinations for promotion to the classification of Correction Sergeant (Male).

Richard S. Barrett, Ph.D.
Riverview Place
Hastings-on-Hudson, New York.

F. The person named below may testify as an expert witness on the subject of the under-representation of minority persons in the facilities of the Department of Correctional Facilities.

Dean Robert B. McKay [not called]
29 Washington Square West
New York, New York.

G. The persons named below may testify about the construction and validation of Civil Service Examination Number 34-944, about prior examinations for promotion to the classification of Correction Sergeant (Male) and about the methods research project being conducted by the Examination Division of Defendant Department of Civil Service. The plaintiffs would prefer to seek their testimony on cross-examination during defendants' case in the interest of orderly presentation of the issues. Plaintiffs by this specification are requesting that defendants formally indicate (1) whether these witnesses will testify for defendants; (2) if not, whether they will be produced at trial for plaintiffs.

1. Kenneth Siegel [called by defendants]
1066 Curry Road, Apt. 35
Schenectady, New York.
2. Samuel J. Taylor
2868 Old State Road
Schenectady, New York 12303.

H. The persons named below will testify about the qualifications and job duties of Correction Officers and Sergeants (Male), the qualifications of plaintiffs and other employees at Ossining Correctional Facilities, and the appointment of certain provisional Correction Sergeants at Ossining Correctional Facilities.

Gerard B. Ryder
318 Spring Street
Ossining, New York 10562.

I. Plaintiffs may call other witnesses in rebuttal to defendants' case. The identity of these witnesses is not presently known.

III. DOCUMENTS

Plaintiffs will offer into evidence the following documents:

- PX1. Plaintiffs' First Interrogatories to Defendants, filed April 26, 1973.
- PX2. Defendants' Answers to Plaintiffs' First Interrogatories sworn to May 29, 1973 (without exhibits).
- PX3. Defendants' Supplementary Answers to Plaintiffs' First Interrogatories and Corrected Answer to Interrogatory "6" sworn to June 18, 1973 (without exhibits).
- PX4. Specifications - New York State Department of Civil Service Correction Officer Series (Exhibit "2" to PX2).
- PX5. New York State Department of Civil Service Eligible List Prom. 34944 (Exhibit "5" to PX2).

- PX6. Memorandum dated December 7, 1972 (Exhibit "2-A" to PX3).
- PX7. Letter dated July 29, 1970 (Exhibit "4-A" to PX3).
- PX8. Five KS&A statements (Exhibit "5-A" to PX3).
- PX9. Interoffice Memorandum dated June 2, 1972 (Exhibit "8-A" to PX3).
- PX10. Excerpts from meetings held prior to 10/14 examination (Exhibit "9-A" to PX3).
- PX11. Correction Sergeant Report (Exhibit "11-A" to PX3). [identification only]
- PX12. Corrected display in answer to Plaintiffs' Interrogatory No. 14.
- PX13. Civil Service Rules and Regulations (5 pages).
- PX14. Narrative Description of Examination Planning and Construction (1 page only).
- PX15. Candidates' Review Declaration and Answer Sheet for Edward L. Kirkland.
- PX16. Candidates' Review Declaration and Answer Sheet for Nathaniel Hayes.
- PX17. Announcement.
- PX18. Test 485-E.
- PX19. Test 468-E.
- PX20. Final Examination Rating Key.

Note: PX13-20 were provided by defendants in response to plaintiffs' first request for production of documents.

- PX21. Employee Status Change and Data Sheet for James A. Holman.
- PX22. Selected documents from personnel file of Nathaniel Hayes.
- PX23. Selected Documents from personnel file of Edward L. Kirkland.

Note: PX21-23 were copied at Ossining Correctional Facility. Copies are attached hereto.

- PX24. Vita, Richard S. Barrett.
- PX25. List of employment discrimination cases in which Dr. Barrett has testified.
- PX26. Standards for Educational and Psychological Tests and Manuals, American Psychological Association (1966).
- PX27. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq.
- PX28. "Scatter Diagram" for 1970 Sergeant Examination, with explanatory letter.
- PX29. Chart entitled "Ans. Int. 3 a/o 1/1/73".
- PX30. Chart entitled "Ans. Int. 3 a/o 5/1/73".
- PX31. Table entitled "Ans. Int. 5 - Total Employment Statistics, Department of Correctional Services".
- PX32. Table entitled "Ans. Int. 6 - Statistical Data on Sergeants and Correction Officers".
- PX33. Table entitled "Ans. Int. 14 - Analysis of Scatter Diagrams".
- PX34. Summary of Scatter Diagrams for Examination Number 34-944.

- PX35. Summary of Scatter Diagrams for Examination Number 34-007.
- PX36. Letter from Superintendent Vincent to Albert Young, dated April 18, 1973.
- PX37. Letter from Superintendent Shubin to Suggs dated April 6, 1973.
- PX38. Letter from Superintendent Schublin to Hayes dated April 6, 1973.
- PX39. Letter from Superintendent Schublin to Kirkland, dated April 6, 1973.
- PX40. Letter from Shubin to Holman, dated April 6, 1973.
- PX41. Notification of Examination Result to Henry A. Liburd.
- PX42. Project description
- PX43. Descriptive material submitted pursuant to agreement with defendants.

Note: Copies of PX29-33 are attached hereto.

Plaintiffs may, in addition, seek to introduce documents produced by defendants shortly before or after the compiling of the above list, which documents plaintiffs have not had an opportunity to review.

Plaintiffs may introduce other exhibits in connection with rebuttal of defendants' case. These exhibits cannot now be identified.

Respectfully submitted,

JACK GREENBERG
JEFFREY A. MINTZ
DEBORAH M. GREENBERG
MORRIS BULLER
Attorneys for Plaintiff
10 Columbus Circle
New York, New York 10019

DEFENDANTS' PRE-TRIAL SPECIFICATIONS

DEFENDANT'S PRE-TRIAL SPECIFICATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

-against-

73 Civ. 1548
M.E.L.

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, ET AL.,

Defendants.

-----X

DEFENDANTS' PRE-TRIAL
SPECIFICATIONS.

Issues to be Presented at Trial

- I. Whether the plaintiff Brotherhood of New York State of Correction Officers has standing to bring the claims set forth in the complaint as amended.
- II. Whether the plaintiffs Kirkland and Hayes have standing to challenge examinations for the title of Correction Officer.
- III. Whether Examination No. 34-944 had a significant differential impact on Black and Hispanic candidates.

- IV. Whether the named plaintiffs and others alleged to be similarly situated are qualified to perform the job of Correction Sergeant.
- V. Whether Examination No. 344-944 is job-related under appropriate standards of proof.
 - A. Whether Examination No. 34-944 was developed and administered consistently with content and rational validation methods.
 - B. Whether it is probable that Examination No. 34-944 is job-related.
- VI. Whether the defendants were under any Constitutional obligation to increase minority representation in the title of Correction Sergeant prior to any judicial or administrative adjudication that the defendants' practices and procedures referable to that title were discriminatory.

VII. Whether this action meets the requirements as a class action under Rule 23 of the Federal Rules of Civil Procedure.

- A. Whether the definitions of the class and/or sub-classes are appropriate.
- B. Whether the potential plaintiffs are so numerous as to make joinder impracticable.
- C. Whether there are common questions of law or fact among the members of the alleged class and/or subclasses.
- D. Whether the claims of the named plaintiffs are typical of the alleged class and/or subclasses.
- E. Whether the named plaintiffs are representatives of the alleged class or classes.

Defendants' Witnesses

1. The following witness will testify regarding the differential impact of Examination No. 34-944 on Blacks and Hispanics:

KENNETH SIEGEL.

2. The following witnesses will testify concerning their respective roles in the development and administration of Examination No. 34-944, its validity and/or job-relatedness:

KENNETH SIEGEL

SAMUEL J. TAYLOR [called by plaintiffs]

WILLIAM QUICK

HENRY BANKHEAD [not called]

HYLAN SPERBACK

3. The following individuals may testify about their roles in the development and administration of Examination No. 34-944, its validity and/or job-relatedness:

DAVID HARRIS [not called]

KATE TANG [not called]

JOHN DECKER [not called]

DONALD ETTER [not called]

WILLIAM NEVINS [not called]

WILLIAM O'GRADY [not called]

JERRY DUROVIC [not called]

ROBERT CORNUTE
Division of Criminal Justices
Services [not called]

ERWIN K. TAYLOR, Ph. D

4. The following witnesses will testify about the duties and responsibilities of Correction Sergeants and/or the performance of the named plaintiffs as provisional Correction Sergeants:*

WILLIAM QUICK

RONALD MILES [not called]

HYLAN SPERBACK

5. The following individuals may testify about the duties of Correction Sergeant and/or the basis for provisional appointments made at Ossining in the Summer of 1972:

RONALD MILES [not called]

THEODORE SCHUBIN [not called]

A. SABOLIK [not called]

STEVEN JAFFE [not called]

* The defendants reserve the right to call additional witnesses to testify about the performance of persons designated as Black provisional Sergeants and witnesses or potential witnesses in plaintiffs' pre-trial specifications. The identity of these potential witnesses is not known at this time.

6. The following individuals may testify concerning the propriety of permitting the action to proceed as a class action:

ALBERT RUBEIRO [not called]

LEONARD BROWN [not called]

C.E. SMITH [not called]

The defendants reserve the right to call additional witnesses in response to matters alleged in the presentation of plaintiffs' case.

Materials to be Offered
in Evidence*

- DXA Class specifications for Personnel Examiner Series (Exhibit "5" to PX2).
- DXE Class specifications for Civil Service Examinations and Staffing Services series (Exhibit "6" to PX2).
- DXC Class specifications for Classification and Pay Analyst Series (Exhibit "7" to PX2).
- DXD Sequential Training Curriculum for New York State Correction Officers (Exhibit "1A" to PX3).

* Materials cited by plaintiffs which defendants consider appropriate to their case as well have not been noted. The materials cited represent defendants' best estimate as of this date. Defendants reserve the right to offer additional materials inadvertently omitted from the list and/or in opposition to proof presented by plaintiffs. If it appears that any materials were inadvertently omitted, defendants' attorney will advise plaintiffs' attorneys as quickly as possible.

- DXE Occupational Survey of Correction Officer and Related Positions, including related memoranda (Exhibit 3A to PX3).
- DXF Memorandum describing Preparing Written Material and Supervision Subtests on Examination No. 34-944 (Submitted in response to Notice of Produce). [withdrawn]
- DXG Appeals item analysis and appeals determinations on Examination No. 34-944.
- DXH Ethnic Item Analysis on Examination No. 34-944 (previously provided to plaintiffs).
- DXI Outline of Training Course for Test Construction and Analysis. (Exhibit "12A" to PX3).
- DXJ Civil Service Department Text for Training Course in Test Construction and Analysis (Exhibit "13A" to PX3).
- DXK Sample problems, guidelines and materials used in Training Course and Test Construction and Analysis (Exhibits "14A" through "17A" to PX3).
- DXL Letter of August 23, 1973 to Ossining Supervisory Staff re: recommendation for provisional appointments (submitted herewith).
- DXM Recommendations of Ossining Supervisory Staff to Theodore Schubin re: provisional appointments (submitted herewith).
- DXN Manual of Correctional Standards, American Correctional Association.
- DXO Department of Correctional Services Employee Rule Book.

- DXP Supervisory and Management Training Course, American Management Association (available for inspection at the offices of defendants' attorney). [withdrawn]
- DXQ Memorandum of William Quick, dated October 2, 1972 (submitted herewith).
- DXR Duties Statements and Plot Plans (previously provided to plaintiffs).
- DXS Chart showing comparison of job tasks and K, S & A's from Duties Statements with job tasks and job K, S & A's on Examination No. 34-944 (available for inspection at the offices of defendants' attorneys). [identification only]
- DXT Diagram of Green Haven Correctional Facility showing Sergeants' assignments by shifts (available for inspection at the office of defendants' attorney).
- DXU Diagram of Ossining Correctional Facility showing Sergeants' assignments by shifts (available for inspection at the office of defendants' attorney).
- DXV Sample Sergeants' Reports (submitted herewith). [identification only]

Defendants intend to refer to at least the following published legal materials:

N.Y.S. Correction Law; Codes, Rules and Regulations of the New York State Department of Correctional Services, 7 N.Y.C.R.R.

United States Civil Service Commission
Examining, Testing, Standards and
Employment Practices, 37 Fed. Reg. 21552
(October 12, 1972) (submitted herewith).
[withdrawn]

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By:

JUDITH A. GORDON
Assistant Attorney General

SUPPLEMENTARY LIST OF MATERIALS TO BE OFFERED IN EVIDENCE
BY DEFENDANTS
SUPPLEMENTARY LIST OF MATERIALS TO BE OFFERED
IN EVIDENCE BY DEFENDANTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

73 Civ. 1548
M.E.L.

-against-

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants.

-----X

SUPPLEMENTARY LIST OF
MATERIALS TO BE OFFERED
IN EVIDENCE BY DEFENDANTS

- DXW Sample Administrative Bulletins of the
Department of Correctional Services.
[withdrawn]
- DXX Candidate Appeals from Kirkland and
Hayes and decisions on items placed in
issue.
- DXY Candidate Objection Forms for plaintiffs
Kirkland and Hayes.
- DXZ Petitions and signature pages circulated
by employees at Ossining. [withdrawn]
- DXAA Membership Roster of the Brotherhood of
New York State Correction Officers Inc.
[withdrawn]
- DXBB Letter to Poston
- DXCC Letter from Hayes to Denno
Letter from Denno to Hayes
- DXDD Ethnic Statistical Analysis (Siegel)

DXEE Vita of Erwin K. Taylor
DXFF Deposition of Gerard Ryder
DXGG Siegel Resume
DXHH Ciuros Resume
DXII Harris Resume
DXJJ Kanofsky Resume
DXKK Tang Resume
DXLL Decker Resume

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

JUDITH A. GORDON
Assistant Attorney General

PLAINTIFFS' PROPOSED FINDINGS OF FACT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X	:	
EDWARD L. KIRKLAND, et al.,	:	
	:	
Plaintiffs,	:	M.E.L.
	:	
vs.	:	73 Civ. 1548
	:	
THE NEW YORK STATE DEPARTMENT OF	:	
CORRECTIONAL SERVICES, et al.,	:	
	:	
Defendants.	:	
-----X	:	

PLAINTIFFS' PROPOSED FINDINGS OF FACT

I. Introduction

1. This action for declaratory and injunctive relief was filed on April 10, 1973 by Edward L. Kirkland and Nathaniel

Hayes, Black provisionally-appointed Correction Sergeants, and the Brotherhood of New York State Correction Officers, Inc., an organization of Black and Hispanic Correction Officers, against the New York State Department of Correctional Services, the Commissioner of the Department of Correctional Services, the New York State Civil Service Commission, and the three Civil Service Commissioners. The complaint challenges the legality of Civil Service examination number 34944 for promotion to the position of Correction Sergeant (Male) on the ground that it had a discriminatory impact upon Black and Hispanic candidates and could not be shown to be job-related.

2. On April 10, 1973 this Court entered a Temporary Restraining Order restraining defendants from making any permanent appointments to the position of Correction Sergeant (Male) and from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the class who were provisional Correction Sergeants (Male),

said restraining order to expire at 5:00 P.M. on April 2, 1973.

3. On April 11, 1973 this Court modified the Restraining Order, entering the same to 5:00 P.M. on April 20, 1973. Later that same day, this Court entered an order clarifying and supplementing said Temporary Restraining Order.

4. On April 18, 1973 the parties entered into a stipulation extending said Temporary Restraining Order and Supplemental Order until such time as this Court should enter its decision on the merits or earlier rule on plaintiffs' application for a preliminary injunction.

5. On June 22, 1973 plaintiffs filed an amended complaint alleging that prior Sergeant examinations had a discriminatory impact on Blacks and Hispanics and could not be shown to be job-related.

6. The trial on the merits was consolidated with the hearing of plaintiffs' application for a preliminary injunction, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Pro-

cedure. Said trial commenced July 23, 1973 and lasted six days.

7. The Brotherhood of New York State Correction Officers was permitted to withdraw as plaintiff at the start of the trial.

II. Parties

8. Plaintiffs Edward Kirkland and Nathaniel Hayes are Black citizens of the United States and residents of New York State. Each is employed by defendant New York State Department of Correctional Services at Ossining Correctional Facility as a provisional Correction Sergeant (Male).

9. The defendant New York State Department of Correctional Services maintains and operates a number of correctional institutions throughout New York State at which correctional personnel are employed. Defendant Oswald was, at the time of filing of the complaint, the Commissioner of that Department and had general authority to administer its functions.

10. Defendant New York State Department of Civil Service administers a number of functions related to the selection, employment, and promotion of personnel for the defendant Department of Correctional Services. The New York State Civil Service Commission has general responsibility for these functions. Defendant Poston is the President, and defendants Stockmeister and Scelsi, are members of the New York State Civil Service Commission.

III. General

11. In the Correction Officer series of the New York State Department of Correctional Services, the entry level position is that of Correction Officer. Promotions are made to the successive supervisory positions of Sergeant, Lieutenant, Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent on the basis of performance on a series of written

examinations.

12. Candidates for promotion from Correction Officer to Correction Sergeant must take a written examination prepared and administered by the New York State Department of Civil Service. The passing score is established by the Department of Civil Service, after the examination has been scored, at a level which will insure that an adequate number of people will be available to fill vacancies.

13. Those who attain passing scores are placed on a ranked eligible list on the basis of their scores, after the addition of seniority credits and veteran's preference credits (where applicable). After eligibles have been canvassed to ascertain acceptors for geographic areas where correctional facilities are located, candidates are selected from eligible lists in rank order, subject to the One in Three rule. In the event that an eligible list is exhausted before the publication of a new

eligible list, provisional appointments to the position of Sergeant are made on the basis of ability as a Correction Officer, evaluations from the superintendent and supervisory personnel, and ability to provide leadership and empathy to the inmate population.

14. As of May 1, 1973 there were no blacks or Hispanics holding permanent appointments to the rank of Correction Sergeant (Male). Of the 237 men in the combined classifications of Sergeant, Lieutenant and Captain, only two - one Captain and one Lieutenant - were black, and none was Hispanic.

15. As of January 1, 1973 there were 85 provisionally appointed Sergeants and 122 permanent Sergeants in the Department's correctional facilities. Ten of these provisional Sergeants were Black; none was Hispanic.

16. Since 1961 there have been only two Black and no Hispanic male personnel in the correctional facilities of New

York State holding supervisory positions.

IV. Examination 34944: Impact and Construction

17. On October 14, 1972, the Department of Civil Service administered promotional examination 34944 for the position of Correction Sergeant (Male). 1,432 men took the examination and 406 passed. Of the 1,263 whites who took examination 34944, 389 or 30.8% received a passing score; of the 104 Blacks who took the examination, 8, or 7.7% passed; and of the 16 Hispanics, who took the examination, 2, or 12.5% passed. Taken together, only 8.3% of the Blacks and Hispanics who took examination 34944 passed.

18. The Sergeant examination is given every two years. After the promulgation of the eligible list resulting from an examination, the eligible list from any prior examination, if it has not been exhausted, expires, and no further appointments can be made from it.

19. During the life of the eligible list resulting from examination 34944, defendants estimate that 127 to 147 Sergeants will be appointed therefrom.

20. While the record does not reflect the race or ethnicity of persons on the eligible list, a print-out of the results of examination 34944 shows that of the 159 highest scoring candidates, 157 are white and 2 are Black. There is nothing in the record to indicate that this pool of 159 eligibles would not be sufficient to provide the 127-147 Sergeants who are likely to be appointed from this list. Thus, while 157, or 12.4% of the whites took the test are likely to be appointed, only 2, or 1.9% of the Blacks, and none of the Hispanics, who took the test are likely to be appointed.

21. The steps leading up to and including the construction of examination 34944 were under the general supervision of Mr.

Samuel Taylor, who is a section head in the Test Development Bureau of the Department of Civil Service. Mr. Taylor testified at length about those steps.

21a. Examination 34944 was a written examination consisting of five sub-tests of 15 items each. Each subtest was designed to test for knowledge, skills and abilities (K,S, &A's) in one of the following areas: Laws, rules and regulations; modern correctional methods; using good judgment; preparing written material; and supervision. Each subtest was arbitrarily assigned equal weight, without consideration of the relative importance of the various K,S,&A's purportedly tested.

22. The subtests on laws, rules and regulations; modern correctional methods; and using good judgment were prepared by personnel under the supervision of Kenneth Siegal, of the Correction Committee section of the Test Development Bureau of the Department of Civil Service. They were assisted by three officers

at the rank of Lieutenant or Captain from the Department of Correctional Services; these officers submitted proposed questions, many of which were used on examination 34944 after review and modification. Personnel in the Siegal group also consulted various correctional materials. Mr. Siegal testified at considerable length about his group's work in the test-development process.

23. The subtests on preparing written material, and supervision were prepared by personnel in a special section of the Test Development Bureau which prepared subtests on these subjects for a variety of different occupations including those of the Correction Officer series. These subtests appeared on examination 34944 without further review or modification. There is no evidence that these personnel consulted any correctional

materials or correctional personnel in drafting their subtests.

24. At the time examination 34944 was drafted, defendants did not have or use an adequate job description or analysis of the job of Correction Sergeant (Male). Defendants' knowledge of the job duties consisted of unsystematic and largely unrecorded observation of correctional personnel (mostly Correction Officers) plus consultation of documentary statements of job duties and requirements which were not shown to provide any meaningful idea of actual job content.

25. In the subject matters tested and the method of test construction, examination 34944 is nearly identical to examinations given for Correction Sergeant during the last ten years.

26. The job of a Correction Sergeant has changed substantially in recent years, according to the unanimous testimony of both sides' witnesses, in that functions of counseling and rehabilitation of inmates, as opposed to purely custodial duties,

are now emphasized. Neither the examination nor the K, S, & A's and scope statements and class specifications, on which the examination was in part constructed, reflect this evolution.

27. Passing score on examination 34944 was set at 70%, the maximum passing score allowed by state law. The pass point was set only after the examination had been scored. It was selected in order to regulate the number of eligible candidates. The test was not written with a particular passing score in mind; nor was the score-setting based on a reasoned judgment as to what degree of test success would reasonably assure job competence.

28. At no point in the test-construction process did the defendants ever consider the desirability of using selection instruments other than a written test as part of the selection process for promotion. In particular, no consideration was given to use of performance ratings in the Correction Officer position.

29. Examination 34944 did not consist of a representative sampling of those knowledges, skills and abilities which are critical to successful performance of the job of Correction Sergeant.

30. Examination 34944 failed to test several qualities, including leadership, empathy, understanding of the resocialization process, and ability to function in crisis situations, important for successful performance of the Correction Sergeant's duties.

31. Many of the actual questions appearing on examination 34944 are poorly constructed, defective, or apparently not job-related. A substantial number of the questions are designed to test knowledge which a Sergeant need not have and would have no occasion to apply. Many other questions were poorly constructed in that the questions or answer choices were incomplete or ambiguous. Other questions implied presumptions which have no demonstrated validity. Still others rewarded skill in test-taking, apart from any knowledge of the subject matter tested. Two entire subtests - preparation of written material, and supervision - were apparently designed to have no specific relationship at all to the correctional context.

V. Prior Sergeant Examinations

32. On Examination 34007 for Correction Sergeant (Male), which was given in 1970, at least 94 whites of 997 identifiable white test-takers passed, for a pass rate of 9.4%; none of the 46 Blacks and one Hispanic who took the test achieved a passing score. The virtually complete absence of Blacks and Hispanics from promoted positions before 1970 indicates that very few minority-group Correction Officers passed or scored high enough on pre-1970 examinations to be promoted.

33. The available evidence indicates that prior examinations for Correction Sergeant were not developed by a different or more sound process than examination 34944 and were not significantly different in subject matter or nature of the items.

VI. Lack of Job-Relatedness of
Sergeant's Examinations.

34. There are three professionally recognized methods of determining the job-relatedness of written examinations to the ability to perform the job being tested for: (1) predictive, or criterion-related, validation; (2) content validation; and (3) construct validation.

35. Predictive validation is the preferred method of establishing job-relatedness, where it is not technically infeasible to perform such a validation.

36. Defendants have not proved that it would have been technically infeasible to have performed a predictive, or criterion-related, validation study of examination 34944.

37. Defendants have not attempted to perform a validation study of examination 34944 or previous Sergeants' examinations by either the criterion-related or construct validation methods.

38. Defendants' testing expert testified that defendants' general test construction procedures, if properly followed and with assistance from qualified subject matter experts, might result in a content-valid examination. He could not give any opinion as to whether examination 34944 was in fact a job-related test.

39. Plaintiffs' testing expert testified that deficiencies in the test construction process and evidence of poorly constructed questions made it improbable that examination 34944 was in fact job-related.

40. Examination 34944 was constructed by a process which does not meet professional standards of test development and which does not meet the standards of the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§1607.1 et seq.

41. Defendants failed to demonstrate the job-relatedness of examination 34944 or any other Sergeant examination by the content validation method.

VII. Ability of Class Members to Perform as Correction Sergeants

42. In 1972 a number of provisional appointments were made to the Correction Sergeant position. Superintendents of the Corrections facilities selected these provisional appointees from the ranks of Correction Officers, who were not at that time test-qualified. Selections were made on the basis of supervisory recommendations and ability to provide empathy and leadership to the inmate population. At least ten Blacks were among the approximately 80 Correction Officers chosen for provisional promotion.

43. Provisional Correction Sergeants, including the ten Blacks appointed in 1972, perform the same duties as permanently appointed Correction Sergeants.

44. Plaintiffs Hayes and Kirkland and four Black witnesses who testified for plaintiffs have been satisfactorily performing the Correction Sergeant's duties since they were provisionally appointed to that occupation on provisional status in July and August, 1972. There is no evidence that the other Black provisional Sergeants, who were also appointed in about August, 1972, have performed in an other than satisfactory manner. On the contrary, the evidence indicates that all the provisional Sergeants at Ossining were performing well in the job.

45. Of the six Blacks who are provisional Sergeants and who testified, all took examination 34944 but only one passed, and his score is not high enough to assure him promotion.

46. The named plaintiffs and five other Black officers - the four provisional Sergeants Young, Suggs, Holman, and Kimble - plus Correction Officer Liburd - each testified about his experience as an Officer and/or Sergeant and qualifications for the Sergeant position. Each of them has performed satisfactorily for many years as a Correction Officer and has extensive experience with the operations of defendants' correctional system. Many of them have received unusual praise or commendation from defendant Department of Correctional Services' Superintendents for their performance on particular occasions. All but Liburd, who was not provisionally appointed, were in April 1973 highly commended for their performance of the Correction Sergeant's duties while on provisional status. Each has demonstrated

qualities of initiative, dedication, and leadership inside and outside the institutional context. Each exemplifies the qualities of concern for inmate rehabilitation and empathy with the inmate population, which defendants' officials have testified is fundamental to success in the Correction Sergeant position today. The Court is persuaded that each possesses the qualifications to perform satisfactorily as a Correction Sergeant.

47. By appointing them as provisional Sergeants and commending their performance as such, defendant Department of Correctional Services has in effect conceded that the named plaintiffs and witnesses Young, Holman, Suggs, and Kimble are able to perform satisfactorily as Correction Sergeants.

48. The only reason that was suggested by defendants to indicate that those persons would not be able to perform adequately as Sergeants was their inability to pass or score high on the written examinations.

49. Witness Liburd was the object of overt and repeated acts of racial discrimination and racially motivated hostility during his years of service at Walkill Correctional facility. The source of much of this discriminatory treatment was the same supervisory personnel who were responsible for nominating provisional Sergeants. Liburd's failure to be selected as provisional Sergeant is therefore not evidence that he lacked the necessary qualifications. On the contrary, his testimony and service record demonstrate that he is eminently qualified, by virtue of the same qualities evidenced by plaintiffs and their other witnesses, to perform as a Correction Sergeant.

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
M. E. L. 73 Civ. 1548

EDWARD L. KIRKLAND, et al.,
Plaintiffs,

- vs -

THE NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES, et al.,
Defendants.

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter under 42 U.S.C. §1343(3) and (4) to redress the deprivation of plaintiffs' rights secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1981, 1983.

2. This action is maintainable as a class action pursuant to Rule 23(a), (b) (2), F.R.C.P. The class represented by plaintiffs is defined as: "All those Black and Hispanic persons pre-

sently employed by the New York State Department of Correctional Services who took Civil Service examination number 34944 for promotion to the position of Correction Sergeant (Male) but by virtue of their performance on that examination are not eligible for, or will not be permanently appointed to, the Correction Sergeant position."

3. The plaintiffs have made out a convincing statistical showing that examination 34944, held in 1972, has a disproportionate adverse impact on Black and Hispanic candidates for promotion to Correction Sergeant. The absence of minority group Sergeants in the past, the testimony of witnesses, and partial statistical data on the results of the 1970 examination (34007) indicate that previous Sergeant examinations had a similarly disproportionate impact. On these facts, a prima-facie showing of discrimination is made out and the burden shifts to the defendants to justify examination 34944 by affirmative proof as significantly related to the Correction Sergeant job.

4. Defendants have failed to meet their burden of justification under applicable law, in that they have not demonstrated that examination 34944 was significantly job-related.

(a) Defendants neither performed nor attempted any empirical, i.e. criterion-related, validation study of examination 34944. Such a study is preferable to other types of validation unless, unlike here, it can be shown not to be feasible as a practical matter.

(b) The defendants' test development and validation process was in numerous significant respects not in compliance with the standards set forth in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§1607.1 et seq. (1970). These Guidelines, while not strictly controlling here, are to be accorded substantial deference by the courts in this kind of action.

(c) The test development process was carried out in the absence of any adequate job description or job analysis of the Correction Sergeant position. This fact renders it highly unlikely that the test accurately sampled the actual job content and renders highly suspect the defendants' content validation analysis, for which job descriptions are a prerequisite.

(d) The purportedly content-valid procedure for development of examination 34944 was legally defective in that the scope of subject matters sampled, the relative weights assigned to subject matters, the form of the examination and the passing score were determined without adequate consideration of the relationship of the test to job performance; and in fact the scope, weighting, form and passing score have not been shown to have been selected in a job-related manner.

(e) The examination 34944 was shown to be not job-related in that many test items were poorly constructed, or tested knowledge not directly required for or useful to a Sergeant's job, or rewarded test-wiseness and basic verbal skills as distinct from job performance ability or potential.

(f) Examination 34944 was not shown to be job-related by a content validity analysis in that two parts of the test comprising 40% of the items were prepared by persons having no specific knowledge or familiarity with the Sergeant job (insofar as the record reflects), for administration candidates for a number of positions in addition to Correction Sergeant.

(g) Examination 34944 was not shown to be related to the present Sergeant's job in that it fails to reflect any of the significant changes in the Sergeant's job in recent years and fails to test for the particular attitudes, skills, or abilities which the successful performance of these new aspects of the Sergeant's job depends upon.

(h) The result of defendants' purportedly content-valid process was a test that is not even superficially content-valid, since it is not a sample of the actual job or significant elements thereof but rather a paper-and-pencil exercise probing knowledge and attitudes assumed, but nowhere proved, to be part of the actual job content.

(i) The lack of demonstrable job-relatedness of examination 34944 is further indicated by the fact that many persons, white and Black, who were satisfactorily performing the job of Correction Sergeant on provisional status at and before the time they took the examination, were unable to pass it.

developed by the same general procedure as 34944, suggests that such previous examinations were not significantly related to the Sergeant's job.

6. Examination 34944 was unlawful under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§1981, 1983; and appointments or other actions on the basis of that examination unlawfully violate the rights of plaintiffs and the class they represent.

7. In granting relief from unlawful discriminatory governmental action, it is the Court's duty not only to prohibit the continuation of discriminatory actions and require development of non-discriminatory procedures, but also to grant effective affirmative relief from the present effects of past discrimination.

8. Appropriate measures of affirmative injunctive relief from the effects of unlawful discrimination, including preferential promotion rights for victims of previous discrimination, offend neither the United States Constitution nor the anti-preferential treatment provisions of Title VII, 42 U.S.C. §2000e-2(j); and are not limited by State law or State Constitutional provisions.

9. The plaintiffs are entitled to an award of costs, including reasonable attorney's fees, as a part of the general equitable remedy in light of their position as "private attorneys general".

CERTIFICATE OF SERVICE

I hereby certify that on the day of October, 1973,
I served a copy of the foregoing PLAINTIFFS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW upon Louis J. Lefkowitz, Esq.,
Attorney General of the State of New York; Irving Galt, Esq.,
Assistant Attorney General of the State of New York; Judith
Gordon, Esq., Assistant Attorney General of the State of New
York, Two World Trade Center, New York, New York 10047 by placing
a copy of same in the United States mail, adequate postage
prepaid.

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
APR 1 1974

-----X

EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

NEW YORK CITY OFFICE

Plaintiffs,

73 Civ. 1548

-against-

OPINION

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES; PETER PREISER, individually and in
his capacity as Commissioner of the New York
State Department of Correctional Services;
THE NEW YORK STATE CIVIL SERVICE COMMISSION;
ERSA POSTON, individually and in her
capacity as President of the New York State
Civil Service Commission and Civil Service
Commissioner; MICHAEL N. SCELSE and CHARLES
F. STOCKMEISTER, each individually and in
his capacity as Civil Service Commissioner,

Defendants.

-----X

APPEARANCES:

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General, Of Counsel.

LASKER, D. J.

This suit is another in an ever-extending series of challenges to civil service examinations. Plaintiffs, who are Correction Officers, ^{1/} provisionally appointed to the rank of Correction Sergeant (Male), contend that the test for promotion and permanent appointment to that position discriminated against them on the basis of race. They seek to represent all Black and Hispanic Correction Officers and provisional Correction Sergeants who failed the examination, who passed it but ranked too low to be appointed or who were deterred by the appointment system from seeking promotion. Defendants are the New York State Department of Correctional Services, its Commissioner, and the New York State Civil Service Commission and its Commissioners.

The action is brought under the Fifth and Fourteenth Amendments to the Constitution and under the Civil Rights Act (42 U.S.C. §§1981 and 1983) and its jurisdictional counterpart (28 U.S.C. §§1343(3) and (4)). Plaintiffs make no claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e-2000e-17), despite the availability, by recent amendment, of remedies under it against states and municipalities (id. at §2000e(a)). ^{2/}

In spring, 1972, the 1970 eligible list for Sergeant appointments was exhausted. To fill needed posi-

tions pending establishment of a new list, the Department of Corrections appointed provisional Correction Sergeants, in August, 1972, to hold their posts until permanent appointments could be made. Both named plaintiffs were appointed at that time.

Upon request of the Department of Corrections, the Civil Service Commission prepared a promotional examination which was administered on October 14, 1972. That examination, 34-944, was taken and failed by plaintiffs and is the subject of this action.

34-944 was taken by 1,383 persons, ^{3/} including 1,264 whites, 103 Blacks and 16 Hispanics. The candidates examinations were graded and the passing grade was established at 70%. After adjustment for veteran's preference and seniority, those who passed were ranked by grade and an eligible list was promulgated on March 15, 1973. On April 10, 1973, this suit was filed and a temporary restraining order entered preventing defendants from making appointments from the list and from terminating the provisional appointments of plaintiffs or members of the class. By modification and stipulation, the restraining order was extended to maintain the status quo until a decision on the merits.

The ground rules for cases such as this have been thoroughly elucidated by recent decisions of the Court of Appeals for this Circuit. We note in particular Vulcan

Society of the New York City Fire Department, Inc. v. Civil Service Commission ("Vulcan"), Civ. Nos. 73-2287 and 2317 (Nov. 21, 1973), aff'g 360 F. Supp. 1265 (S.D.N.Y. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission ("Guardians"), 482 F.2d 1333 (2d Cir.), aff'g in part and rev'g in part 354 F. Supp. 778 (D. Conn. 1973); and Chance v. Board of Examiners ("Chance"), 458 F.2d 1167 (2d Cir. 1972), aff'g 330 F. Supp. 203 (S.D.N.Y. 1971). To summarize the approach adopted by the cases, plaintiffs must first establish a prima facie case showing that the examination has had "a racially disproportionate impact." Vulcan, slip op. at 453; Castro v. Beecher ("Castro"), 459 F.2d 725, 732 (1st Cir. 1972). If they succeed, it then becomes defendants' burden to justify the examination's use despite its differential impact by proving that it is job-related (Vulcan, slip op. at 453) and that any disparity of performance results solely from variance in qualification and not from race (Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); Chance, 330 F. Supp. at 214). Discharging this burden would entitle defendants to judgment; failure would, of course, require the court to take the third step of determining what remedy would be appropriate.

As is typical in cases of this type, plaintiffs do not allege that defendants have intentionally discriminated against their class. Such an allegation is not a necessary

part of their case. Chance, 458 F.2d at 1175-76. As
Supreme 4/
the/Court stated in Griggs:

"[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432.

However, the fact that the alleged discrimination is not claimed to be deliberate modifies the burden placed on the state to justify its actions. Intentional racial discrimination would require the state to demonstrate a compelling necessity for its selection methods. Cf. Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, "the Supreme Court has yet to apply that stringent test to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects." Chance, 458 F.2d at 1177. Agonizing over whether the state can discharge its constitutional obligations merely by suggesting a rational basis for the examination's use or whether it must satisfy a more demanding standard, short of the compelling interest test, is unnecessary. The guidelines have been so refined by the cases that no ambiguity obscures the road to determination regardless of the difficulties of classification which may remain to plague the theorists. Guardians, 482 F.2d at 1337. The decisions impose on the state "a heavy burden of justifying

its contested examinations by at least demonstrating that they were job-related." Chance, 458 F.2d at 1176; see also Guardians, 482 F.2d at 1337. This "heavy burden" is discharged if the state "come[s] forward with convincing facts establishing a fit between the qualification and the job." Vulcan, slip op. at 456, quoting Castro, 459 F.2d at 732. Once the state proves its case to that extent, it need not establish, as would be required under the compelling interest approach, that no alternate means of selection are open to it. Castro, 459 F.2d at 733; see also Vulcan, slip op. at 456.

However clearly the issues are delineated by well-established precedent, nothing can make easy the task of deciding a case such as this. The competing interests are vital to the named parties, to other individuals who may be affected by the outcome and to the public at large. Plaintiffs strive to insure for themselves and the minorities they seek to represent the fair treatment in the public employment sphere which the Constitution guarantees. Their efforts bring them into conflict with those individuals who passed the challenged examination and have a vested interest in securing the promotions which are rightfully theirs if the examination is upheld. For both groups, the outcome is critical since it affects their ability to earn a living by advancing in the profession of their

choice. Last and perhaps most important is the public's stake in establishing and maintaining a system of prison administration which is both competent and representative of the population. As members of the public, we include, of course, the inmates of the prison system who, more than anyone else in the community, are directly affected by the quality of correctional supervision. The delicacy of the decision is further compounded by the potential for heightened tension which attends any direct conflict along racial and cultural lines.

Bearing these factors in mind, we proceed, with caution but without more ado, to a consideration of plaintiffs' prima facie case.

I. DISPROPORTIONATE IMPACT.

Plaintiffs rest their case on the following uncontested statistics. The figures computed by defendants indicate that White candidates passed 34-944 at a rate of 30.9%, while only 7.7% of Black candidates and 12.5% of Hispanic candidates achieved a passing score. (Transcript at 500). That is, Whites passed at a rate approximately four times that of Blacks and 2.5 times that of Hispanics. Defendants concede the statistical significance of these differences. (Post-trial Memorandum at I-4.)

Plaintiffs' evidence reveals an even more startling

disparity among those who ranked high enough to be appointed. The Department of Corrections intends to appoint a maximum of 147 persons from the present eligible list. ^{5/} A computer display of the results of 34-944 (PX-12) reveals that, of 159 persons who scored 57 or above (a group large enough to satisfy the Department's projected needs), 157 were White, two were Black and none was Hispanic. Thus, 12.5% of the Whites who took 34-944 are likely to be appointed, while only 1.9% of Black candidates and no Hispanics have a chance at appointment. These results would lead to the appointment of Whites at 6.5 times the rate of Blacks and would bar completely the appointment of Hispanics.

The statistical significance of these figures is established beyond dispute by the earlier cases. In Chance, Guardians and Vulcan, the impact was less drastically disproportionate among the races. In Chance, the passing rate for Whites was 1.5 times that of Blacks and Hispanics (330 F. Supp. at 210); in Guardians, Whites passed at 3.5 times the rate for Blacks and Hispanics (354 F. Supp. at 784); and in Vulcan, Whites scored high enough to have a chance at appointment at 2.8 times the rate for Blacks and Hispanics (360 F. Supp. at 1269).

Defendants do not challenge the accuracy of plaintiffs' figures (for which they are the source) nor do they deny the statistical significance of the differential impact

indicated by them. They contend, however, that the approach taken by plaintiffs, that is, consideration of the statistics as to the statewide impact of the entire exam, does not accurately reflect the performance of the groups in relation to each other. They urge us, rather, to base our determination of racial impact on the candidates' performances facility by facility rather than throughout the state. They contend that otherwise it is impossible to determine whether minority candidates are succeeding less well as a group because of their racial and cultural backgrounds or because they are located at facilities which, for reasons unspecified, prepare their officers less well for the promotional exam. In fact, the great majority of minority candidates are located at Ossining (82 Blacks out of a total of 104, 9 Hispanics out of a total of 16) with the second largest concentration of Blacks at Greenhaven (8). (PX-12, codes 1007 and 1008.) Defendants argue that if both Whites and minority candidates at Ossining perform less well than persons - White, Black or Hispanic - employed at other facilities, then 34-944 has not been shown to differentiate on the basis of race. Second, defendants contend that, since 34-944 is composed of five subtests, comparative performance on each subtest should be determinative rather than performance on the test as a whole. If these approaches are adopted, they claim, the

three groups of candidates will be shown not to have performed sufficiently differently to make out a prima facie case of disproportionate impact.

To support their argument that the results of 34-944 are relevant only if separated by facility, defendants rely on an analysis of the computer display of examination results (PX-12) drawn up by Kenneth Siegel, the Associate Personnel Examiner who was responsible for the preparation of 34-944. He analyzed the performances of the groups in terms of mean scores on the total exam and on each of the five subtests at Ossining, Green Haven, all the other facilities and all the facilities taken together (DX-DD). The reason for selecting Ossining and Green Haven for special attention was the concentration of minority candidates at those facilities. Siegel's written analysis (DX-DD) does not indicate passing rates, but only mean scores. However, Siegel testified that the difference in passing rates between Whites and Blacks at Green Haven (Transcript at 511) and all other facilities except Ossining is not statistically significant (Transcript at 509, 515). Based on Siegel's testimony, defendants argue that as a result plaintiffs' prima facie case fails with respect to all facilities except Ossining.

The principal obstacle to accepting defendants' analysis is that it is premised on assumptions which are

factually erroneous. Their own statistics bely their theory. Siegel's analysis (DX-DD) of the computer display (PX-12) reveals not only that the mean score for Whites state-wide (48.9) is superior to that of Blacks (43.2) and Hispanics (44.2), but also that the mean scores at Ossining, Green Haven and other facilities considered separately reflect the same pattern. Whites at Ossining achieved a mean score of 47.32, compared with 42.96 for Blacks and 41.56 for Hispanics. The disparity at Ossining is virtually identical to that derived from a comparison of state-wide figures for Whites and Blacks (48.9 to 43.2) and is greater than the state-wide difference between Whites and Hispanics (48.9 to 44.2). This effectively refutes defendants' theory that minority candidates generally performed less well than Whites solely because they were concentrated at Ossining where candidates as a whole did less well. The range at Green Haven is almost as striking and indicates again a greater variance than is found state-wide between Whites and Blacks and an almost identical disparity as that found state-wide between Whites and Hispanics: Whites, 48.68; Blacks 42.00; Hispanics, 44.00. A comparison of results at facilities other than Ossining and Green Haven bears out the trend: Whites, 49.00; Blacks, 45.21; Hispanics, 48.17. It is true that Hispanics at these facilities fared better than at Ossining and Green

Haven and their scores more closely approximate the performance of Whites. However, the importance of this discovery is somewhat discounted by the small size of the sample (6 Hispanic candidates) which decreases the possibility of statistical accuracy (Transcript at 936-37). Furthermore, Siegel's analysis indicates that the standard deviation in mean scores between Whites and Blacks was statistically significant at Ossining, Green Haven and all other facilities as well as state-wide, and the same is true of Whites and Hispanics at Ossining where the largest concentration of Hispanics is found. (DX-DD.)

An analysis of passing rates, which is more appropriate since it is the passing score which determines a candidate's eligibility for appointment, is even more illuminating. Siegel testified that there was a significant difference between the passing rates of Whites and Blacks at Ossining (Transcript at 509), but that no such difference existed between Whites and Blacks at Green Haven and facilities other than Ossining and Green Haven and none between Whites and Hispanics at Ossining, or other facilities. (Transcript at 509-515.) He did not compare the passing rates of Whites and Hispanics at Green Haven because there was only one Hispanic candidate at that facility. (Transcript at 511.) Nor did he testify as to the difference between the passing rates of Whites and Hispanics at

facilities other than Ossining and Green Haven. Siegel is correct that the disparity in passing rates between Whites and Blacks at Ossining is significant: Whites passed at a rate of 23.5% and Blacks at a rate of 4.9%. (PX-33.) However, his testimony as to Blacks at Green Haven and at other facilities and as to Hispanics at Ossining

flies in the face of the figures in evidence. To the contrary, comparison of the groupings mentioned above indicates in each instance a significant disparity between the passing rate of White and minority candidates. Whites at Green Haven passed at a rate of 31.6%, while Blacks and Hispanics achieved rates of only 12.3% and 0%^{6/} respectively. 30.7% of Whites at facilities other than Ossining and Green Haven^{7/} passed 34-944, while only 14.3% of Blacks passed. Although Hispanics at facilities other than Ossining and Green Haven passed at a higher rate than Whites (33.3% compared to 30.7%), the reliability of this computation is put in doubt by the smallness of the sample. Hispanics at Ossining, on the other hand, passed at a rate of 0% compared to a White passing rate of 23.5%. Accordingly, contrary to Siegel's conclusion, the disparity between White and minority candidates was significant with regard to Blacks at Ossining, Green Haven and all other facilities, as well as state-wide, and was

significant with regard to Hispanics at Ossining, where the largest number of Hispanics are located.

These computations destroy the factual premise of defendants' argument that minority performance reflects the facilities in which they concentrated rather than their minority characteristics. We would in any event be forced to reject defendants' theory as a matter of law, even if it could be factually substantiated. Attempts to correlate racial performance to such non-racial characteristics as quality of schooling or educational and cultural deprivation have been rejected as irrelevant to rebut a statistical prima facie case. As the district court opinion in Guardians stated:

"More fundamentally, this data [as to quality of schooling] fails to remove the prima facie showing of discrimination because it does not alter but only tries to explain the difference in passing rates." 354 F. Supp. at 785; see also Vulcan, 360 F. Supp. at 1272. Cf. Castro, supra.

The controlling decisions clearly posit that, in order to shift to defendants the burden of showing that performance on the examination correlates to performance on the job, plaintiffs are required to do no more than demonstrate that minority candidates as a whole fared significantly less well than White candidates, regardless of possible

explanations for their poorer performance. To quote Guardians once more:

"The point is that a discriminatory test result cannot be rebutted by showing that other factors led to the racial or ethnic classification. The classification itself is sufficient to require some adequate justification for the test." Id. at 786.

Finally, we fail to understand the relevance of defendants' attack on plaintiffs' prima facie case. Defendants appear to concede that, at the very least, Blacks at Ossining who failed 34-944 have established their right to challenge its job relatedness. (Post-trial Memorandum at I-11.) This group constitutes two-thirds of the proposed plaintiff class (77 out of 117 Blacks and Hispanics combined), but if even a far smaller number had succeeded in proving disproportionate impact detrimental to themselves, defendants would be obliged, as they themselves concede, to prove job relatedness.

We turn to defendants' second challenge to plaintiffs' case. Siegel's analysis of the computer display indicates that although there is a statistically significant difference in the total mean scores of Whites and Blacks and Whites and Hispanics state-wide and at Ossining, and, as to Blacks, at Green Haven and facilities other than Ossining and Green Haven, not every subtest indicates

such a disparity. (DX-DD.) It is unnecessary to detail the permutations sub-test by sub-test and facility by facility, since the suggested approach itself is invalid as a matter of law. The cases indicate that a showing that the over-all examination procedure produced disparate results cannot be rebutted by fragmenting the process and demonstrating that separately the parts did not differentiate along racial or cultural lines. In Chance, for example, the fact that minority candidates had a higher passing rate than White candidates on seven out of fifty examinations did not vitiate plaintiffs' proof that the series of examinations as a whole discriminated against them and their class. 330 F. Supp. at 211; see also Guardians, 354 F. Supp. at 786. In Vulcan, the very question whether a single examination procedure can properly be subdivided and the parts considered separately, was raised and Judge Weinfeld rejected the proposition:

"Moreover, the examination may not be truncated; whether or not it has an adverse discriminatory impact on minority groups should be considered in terms of the total examination procedure. Here there can be no doubt, whatever the relative impact of component parts, that in end result there was a significant and substantial discriminatory impact upon minorities...." 360 F. Supp. at 1272.

Any other approach conflicts with the dictates of

common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual subtests. Accordingly, plaintiffs' case stands or falls on comparative passing rates alone. Thus, in law and in logic, we find defendants' approach unwarranted.

Rejection of defendants' dual attack on plaintiffs' showing of differential impact leaves no doubt that plaintiffs' prima facie case has been amply established. Accordingly, the burden of proof swings to defendants to demonstrate that 34-944 is job-related. We turn to a consideration of that question.

II. JOB-RELATEDNESS.

"Validation" is the term of art for designating the process of determining the job-relatedness of a selection procedure. Cases and official guidelines recognize three validation methods: criterion-related validation, construct validation and content validation. See, e.g., Vulcan, slip op. at 458-61; Guardians, 482 F.2d at 1337-38 and 354 F. Supp. at 788-89; Equal Employment Opportunity Commission Testing and Selecting Employees Guidelines ("EEOC Guidelines"), 29 C.F.R. §1607, at §1607.5 (a); American Psychological Association Standards for Educational & Psychological Tests and Manuals ("APA

Standards") (PX-26) at 12-13.

A. Criterion - Related Validation.

Decisions in this Circuit and the EEOC Guidelines agree that criterion-related or empirical validation is preferable to other validation methods. Guardians, 482 F.2d at 1337 and 354 F. Supp. at 788; Vulcan, 360 F. Supp. at 1273; EEOC Guidelines at §1607.5 (a). In Vulcan, Judge Weinfeld defined the two methods which are subsumed under the criterion-related rubric:

"Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job." 360 F. Supp. at 1273.

The methodology which unites the two types of criterion-related validity requires two fundamental steps:

"Criteria must be identified which indicate successful job performance. Test scores are then matched with job performance ratings for the selected criteria." Guardians, 482 F.2d at 1337.

The EEOC's minimum standards for validation (EEOC

Guidelines at §1607.5) require an employer to undertake criterion validation if it is feasible. They demand "empirical evidence in support of a test's validity ... based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in [APA Standards]". Id. at subdiv. (a). They state further that "[e]vidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible." Id.

Because this case was not brought under Title VII and no resort has been made to the EEOC as would be required under the 1964 Act, the Commission Guidelines are not binding and cannot finally resolve the issue whether criterion-related validation is required. However, the Guidelines are recognized as relevant and useful as a "helpful summary of professional testing standards" (Vulcan, slip op. at 457-58, n.8) and as "persuasive standards for evaluating claims of job-relatedness" (Vulcan, 360 F. Supp. at 1273, n.23).^{8/}

Notwithstanding the Guidelines' mandate of criterion-related validation and despite suggestions in some cases that only that method suffices to carry the burden of proof as to job-relatedness (Vulcan, 360 F. Supp. at 1273;

Guardians, 354 F. Supp. at 789), no case in this Circuit has gone so far as to hold that failure to test an exam by criterion validation or to demonstrate the nonfeasibility of that approach justifies setting the exam aside even if it has been content validated. Those cases which have indicated a preference for criterion-related validation have also found a lack of content and construct validation before striking down an examination. Furthermore, the Court of Appeals for this Circuit has recently abjured an absolutist approach, stating that "failure to use [criterion-related validation] is not fatal." Vulcan, slip op. at 459.

Defendants specifically admit that 34-944 has not been validated by the criterion-related approach. (Transcript at 389; PX-2, answer to interrogatory 26.) However, in view of Judge Friendly's unambiguous statement in Vulcan that criterion-related validation is not required if the examination can be validated by other means, we turn our attention to the other validation methods.

B. Construct Validation.

The second recognized method of validation is "construct validation." As defined by Judge Friendly in Vulcan, this method "requires identification of general mental and psychological traits believed necessary to suc-

cessful performance of the job in question. The qualifying examination must then be fashioned to test for the presence of these general traits."^{9/} Slip op. at 460-61. We mention this method only for the sake of completeness; none of the parties has introduced evidence that its use would be appropriate here or that its requirements have been fulfilled.

C. Content Validation.

We reach finally the dispositive issue in the case: Have defendants demonstrated that 34-944 is a content valid examination?

Initially, it is essential to determine precisely what proof is necessary to satisfy the requirements of content validity. Judge Weinfeld's definition in Vulcan reflects the principles established by case law and professional publications:

"An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F. Supp. at 1274 (footnotes omitted). See also Vulcan, slip op. at 460; Guardians, 482 F.2d at 1338.

Accordingly, defendants must demonstrate not only that the knowledge, skills and abilities tested for by 34-944 coincide with some of the knowledge, skills and abilities required successfully to perform on the job, but also that 1) the attributes selected for examination

are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighted to reflect the relative importance to the job of the attributes for which they test; and 3) the level of difficulty of the exam matches the level of difficulty for the job. In sum, to survive plaintiffs' challenge, 34-944 must be shown to examine all or substantially all the critical attributes of the sergeant position in proportion to their relative importance to the job and at the level of difficulty which the job demands.

The problem which confronts the trier of fact when charged with applying these principles to a given situation is that normally, and it is the case here, he is expert neither in psychometrics nor in the field in which the examination is given. Nevertheless, he is required to make factual determinations 1) whether the examination meets professionally acceptable standards of technical adequacy and 2) whether it has content validity for the

job examined. (See EEOC Guidelines, 29 C.F.R. at §1607.5

(a).) ^{10/} To overcome the obstacle presented by lack of expertise, the cases have developed an approach which minimizes the obvious dangers inherent in judicial determination of content validity for a job about which the judge has, at best, only superficial knowledge. Judge Friendly described with approval the approach taken by Judge Weinfeld in Vulcan as follows:

"Instead of burying himself in a question-by-question analysis of Exam 0159 to determine if the test had construct or content validity, the judge noted that it was critical to each of the validation schemes that the examination be carefully prepared with a keen awareness of the need to design questions to test for particular traits or abilities that had been determined to be relevant to the job. As we read his opinion, the judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of the test preparation, the greater must be the showing that the examination was properly job-related, and vice versa. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testimony as to job-relatedness.' The judge's approach makes excellent sense to us. If an examination has been badly prepared, the chance that it will turn out to be job-related is small. Per contra, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial

examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. See Chance, supra, 458 F.2d at 1173." Slip op. at 461.

The primary emphasis, therefore, is on the validity of the methods used in creating the examination not on the independent validity of the end product.

Preparation of a content valid examination requires cooperation between subject matter experts who provide content input and psychometric experts who construct an examination using that input. It goes without saying that the competence of the people involved in the process determines the quality of the product. The cooperative effort of these two groups includes several stages: 1) Analysis of the job to isolate the essential knowledge, skills and abilities required by it; 2) determination of the scope of the examination, the method or methods of testing to be employed and the weight to be given different portions of the examination process; 3) formulation of individual items; and 4) establishment of the passing point.

The cornerstone in the construction of a content valid examination is the job analysis. Without such an analysis to single out the critical knowledge, skills and abilities required by the job, their importance relative to each other, and the level of proficiency demanded as to

each attribute, a test constructor is aiming in the dark and can only hope to achieve job relatedness by blind luck. As Judge Weinfeld stated in Vulcan:

"There is no dispute between the parties that a thorough knowledge of the job to be tested is necessary in order to construct a content valid examination. Without this knowledge it is impossible to determine whether the content of the examination is sufficiently related to the content of the job to justify its use. The means used to acquire this information is known professionally as a job analysis -- really the beginning point. A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill." 360 F. Supp. at 1274.

The persons charged with the responsibility for 34-944, Siegel and Samuel Taylor, testified that, although an adequate job analysis was performed, it does not exist in documentary form. (Transcript at 362-63, 682-83.) Defendants contend, however, that the existence of such an analysis is demonstrated by various documents which are in evidence, namely, a job audit (DX-E), KS & A ^{11/} statements (PX-8), class specifications (PX-4) and the rule book (DX-0). (Transcript at 362.) They argue further that the term "job analysis" means "a series of operations or understandings, discussions by which you identify what people do and why and what can be tested and what should be tested" (Transcript at 362-63) and as such is a "process

[that] cannot really be reduced to something called a job description" (Transcript at 363; see also Transcript at 683). Accordingly, defendants rely on the knowledge of the job, either pre-existing or obtained during the course of the preparation of 34-944, possessed by those who participated in the examination's construction.

The difficulties presented by defendants' approach are manifold. Accepting their argument that a job analysis need not be reduced to writing, it is nonetheless not persuasive that an adequate job analysis existed at some point in the minds of defendants' experts, if, at the present time, they are unable to prove its existence. In fact, the existence of such an analysis has not been proven. The documents relating to the subject which are in evidence do not even approximate a professionally adequate job analysis; the test constructors' knowledge which was not committed to writing is in some instances unproven and in others unimpressive; and the reliance of the test constructors upon various aspects of the purported job analysis is largely unestablished. The logical, and indeed inevitable inference is that no adequate job analysis was performed.

Since the existence of a job analysis is of primary importance in reaching a decision as to job-relatedness, we will comment on defendants' proof on the subject

at some length.

Although Samuel Taylor, Chief Personnel Examiner, testified that, in his opinion, the job audit, KS & A statements, class specifications and the employee rule book together constituted a satisfactory job description "that would be an adequate basis for developing the examination" (Transcript at 362), these documents do not satisfy the requirements of a thorough job analysis as they have been developed by the cases. The job audit (DX-E) has such major flaws that it is almost irrelevant to the case; it was prepared for a purpose other than exam preparation, it was outdated at the time the exam was prepared, and it was devoted almost entirely to describing the position of Correction Officer, not Correction Sergeant. The audit was conducted in order to determine whether various jobs in the Correction Officer Series should be upgraded for the Civil Service classification purpose of determining whether compensation for the positions should be increased. (Transcript at 353; PX-7.) ^{12/} While a document prepared independently of the examination process is not per se disqualified for consideration in preparing a job analysis, it cannot substitute for an analysis having the specific goal of examination preparation in mind. Furthermore, the job audit was conducted in Spring, 1970 (Transcript

at 360), while 34-944 was administered in October, 1972. Siegel, who was responsible for 34-944, testified that the Sergeant job changed within the two years prior to the examination dated. (Transcript at 533, see also PX-42, p. 4.) The audit, almost in its entirety, describes the Correction Officer job. Such references as there are to the Sergeant position do not approach the type of depth of analysis which is essential to the preparation of a job-related test. The audit does not indicate the relative importance of the skills and tasks involved in the Sergeant job or of the competency required for the various aspects of the position, both of which are essential functions of a job analysis. Finally, the persons who prepared the audit did not participate in the preparation of the exam, nor is their competence to conduct the audit in any way established by the record. It is perhaps not surprising, in view of the limited utility of the audit -- and this is perhaps the most critical point to make on the subject -- that it was not consulted by the test constructors in formulating specific exam items. (Transcript at 667-68.)

The other documents on which defendants rely fare no better as substitutes for a job analysis. The class specification (PX-4) is a one paragraph description of the position which contains no more information than would be

possessed by anyone with only a cursory knowledge of the job. It is a useless document for the intended purposes.

The same observation can be made about the KS & A statements (PX-8), which are descriptions of the five examination subtests rather than of the knowledge, skills and abilities demanded by the sergeant job. The "definition of KS & A" which appears for each subtest is a brief paragraph which states, as starkly as possible, the knowledge, skill or ability tested for, without any indication of gradations of complexity, context, methods or anything which would indicate how the knowledge, skill or ability operates in the actualities of the job. In his deposition (a portion of which was read into the record), Siegel stated that "[t]he K, S and A statements are used as guidelines, in effect, in preparation of particular items or of items in general on -- in that they represent the -- the K, S and A statements represent those relevant portions of the position, let's say, which we wish to test and therefore act as a guide in telling us the types of items to write or select." (Transcript at 665.) This description of the use to which these documents were put is not credible, because the statements simply do not provide sufficient particularity to aid in the construction of specific items or even of clusters of items. They are only guidelines in the most general sense of blocking out the scope of the

exam. Accordingly, it is not surprising that, as Siegel admitted, items on the exam were prepared before the KS & A statements. (Transcript at 666.) As a result, the statements are irrelevant to the job analysis, both because they are so lacking in detail as to serve no useful purpose and because they were not relied on. These phenomena are readily explainable by the fact that the KS & A statements were, in fact, the end product of the job analysis "process" rather than a component part of it, or a summary rather than a guideline. As Samuel Taylor stated, in terms which squarely contradict Siegel: "They [the test constructors] didn't rely on it [PX-8], because it didn't exist before they went through their process." (Transcript at 348.)

Finally, the rule book (DX-0) is obviously not a job analysis or a part of a job analysis. The rules themselves are, concededly, important to the job, but what is important to the analysis is how the rules are applied and what depth of knowledge is required, neither of which is indicated by the rule book.

Defendants' reliance on the knowledge of the sergeant job either possessed by the test constructors prior to commencing work on 34-944 or acquired by them during the course of their work on it is also inappropriate.

The record does not establish that the persons who worked on the exam, three of whom came from the Department of Corrections and three from Civil Service, possessed the kind of intimate knowledge of the job that would enable them to do without a job analysis, or would make them, as Samuel Taylor claimed, "living job descriptions" (Transcript at 362).

Of the three persons from the Department of Corrections, only one, Hylan Sperbeck, testified. His qualification as a subject matter expert consists of long service in the Department. The respect to which years of experience might normally be entitled is greatly undercut in his case by the fact that the type of assignments which Sperbeck has held are not necessarily conducive to enhancement of his understanding of the sergeant position. Sperbeck became a Correction Officer in 1957, a Sergeant in 1968, a Lieutenant in 1972 and a Captain in 1973. (Transcript at 738.) Since March, 1970, he has been assigned to the Training Academy and, since that time, he has spent only five or six weekends and four consecutive days in active line duty at any of the facilities. (Transcript at 764-65.) The result is that Sperbeck has been engaged in a normal supervisory capacity at a facility only for the two year period from 1968 to 1970, during which he

was a Sergeant. Given the changes which have occurred in the job since that time, his experience, although useful, cannot substitute for a professionally acceptable job analysis. The qualifications as subject matter experts of the two other persons from Corrections (other than years of service) are not established by the record.

Siegel and the two other persons from Civil Service had no first-hand knowledge of the Sergeant position, although Siegel claims some familiarity with the job from past experience in preparing exams in the Correction Officer Series. He also testified to visits to Cocksackie and Matteawan, but the importance of these visits may not be overemphasized since the visit to the latter was for a purpose unrelated to 34-944 (in fact, there are no sergeants at Matteawan (Transcript at 541)), while the visit to the former entailed only an hour or two of discussion with Sergeants (Transcript at 546-47), and, in any event, one day at a facility is hardly sufficient to make someone an expert as to the job. It is worthy of note, moreover, that two of the five subtests (40% of the exam) were prepared solely by Civil Service personnel, other than Siegel, without any input from the subject matter "experts" from Corrections. (Transcript at 367.)

Accordingly, the record does not establish that the knowledge and qualifications possessed by the test

constructors was such that they can simply be deemed to have had in their heads a job analysis sufficient to satisfy legal and professional requirements. Indeed, a contrary inference is warranted by the record.

We conclude, therefore, that defendants have failed to prove that they performed an adequate job analysis. The same lack of professionalism which characterized the process by which defendants conducted their job analysis also characterized the manner in which they determined the type of examination, its scope, the weight of the subtests and the passing point. All of these matters seem to have been decided almost as a matter of course by referring to and following the practices established by prior exams.

The record indicates that the promotional examination for the Sergeant position has been for many years a written, multiple choice examination. This was true at least as to the examinations given in 1964, 1968, 1970 and 1972. (PX-43) ^{13/} When asked how the decision was reached that the knowledge, skills and abilities needed for the position of Correction Sergeant could best be tested by a written examination, Siegel stated in his deposition:

"[I]t's to a large extent, I suppose, a decision of history, let's say, where previously selections for this position have been made by written examination and I would assume that the request that we received from the

Department of Correctional Services
for this examination also indicated
request for a written examination."
(Transcript at 697.)

Somewhat more thought seems to have gone into the decision not to use performance ratings as any part of the promotional process although such use is permitted by state law (Civil Service Law §52(2)). (Transcript at 671-72.) Siegel and Taylor stated that they considered using supervisory evaluations, but decided not to because of the inadequacy of the existing rating scale. (Transcript 381-82, 672.)

Like the decision to use a written examination and to exclude consideration of supervisory evaluations, determination of the scope and organization of 34-944 seems to have followed the pattern of earlier examinations. Of course, if these set a model for good construction and job-relatedness, that would be a good argument not to depart from their mold. However, while there is evidence in the record of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness. Furthermore, even an exam once job-related may become outdated as jobs change. At the very least, it is fair to say that the slavish imitation of earlier examinations which we find in this case indicates an alarming lack of independent thought about how to assure that 34-944 was

job-related.

The scope of 34-944 was identical to that of the 1964, 1968 and 1970 examinations, except that some of the earlier examinations included a section on interpretation of written materials instead of or as well as the section on preparation of written reports found in 34-944. (Transcript at 530-32; PX-43.) The similarity is not accidental; Siegel and Samuel Taylor both testified that they relied heavily on prior scope statements in defining the scope of 34-944. (Transcript at 530-32, 659.)

Furthermore, the organization of 34-944 is virtually identical to that of its predecessors. Both 34-944 and the 1964 exam contain five subtests of 15 items, while the 1968 and 1970 tests consist of 90 items, including four subtests of 15 items and one of 30 items. (PX-43.) When asked why each subtest on 34-944 was weighted equally with 15 items of the same value, Siegel replied: "By using a set number of items in each sub test, we are able to more routinely do certain types of analyses on this material that gives us additional information of how the items are working, and things like that." (Transcript at 566.) That this was a routine decision based solely or primarily on administrative convenience is further evidenced by his statement that "in our department we work on the basis of

15 questions per sub test and we work in constructing a test in sub test units." (Transcript at 700.) This practice, however, is not necessarily compatible with the notion that different parts of the examination must be weighted as nearly as possible to reflect the relative importance of the attributes tested for to the job as a whole. This lack of individualization in the framing of 34-944 is again demonstrated by the fact that 60% of the items on the Sergeant exam were also found on the Lieutenant exam given at the same time. (Transcript at 534-35.)

Finally, the decision to establish the passing score of 70% subordinates the goal of job-relatedness to that of administrative convenience. Samuel Taylor and Siegel stated that they set the passing score at the maximum permitted by law (Transcript at 524), because that score would still permit a sufficiently large group of passing candidates to satisfy the employment needs of the Department. (Transcript at 380, 524-27.) As a result, Taylor admitted that "its function is really more for the purpose of regulating the number of people who will then be in line to take the job than it is to declare that a man is qualified or not." (Transcript at 341.) Although this approach is not without justifying logic, it departs from the requirement, imposed by law, that such decisions

be made so as to further the paramount goal of job-relatedness. Properly employed, the passing score should serve to separate those who are qualified for the job from those who are not. (Transcript at 880-81.) Admittedly, it did not serve that purpose in this case.

The factors described above lead inescapably to the conclusion that the procedures employed in constructing 34-944 do not conform to professionally acceptable and legally required standards. This determination may be enough to justify a finding that the examination is not job-related, without regard to the quality of the examination. See Fowler v. Schwarzwald, 351 F. Supp. 721, 725 (D. Minn. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, 1355 (N.D. Cal. 1972). As Judge Weinfeld stated in Vulcan: "It should be self-evident that content validity greatly depends upon the adequacy of the manner in which the examination is prepared." 360 F. Supp. at 1275. At a minimum, "under these circumstances only the most convincing testimony as to job-relatedness could succeed in discharging [defendants'] burden." Id. at 1276.

This burden has not been met. To the contrary, positive evidence of job-relatedness is conspicuous by its absence. Defendants' expert, Dr. Erwin Taylor, specifically

refused to testify that 34-944 was job-related. (Transcript at 809-11.) He was not willing to go beyond his statement that "if these procedures were in effect followed, they would constitute the steps necessary but not necessarily sufficient to the development of a series of job related tests." (Transcript at 809.) Plaintiffs' expert, Dr. Richard Barrett, a leading industrial psychologist and expert in the field, while declining to state positively that 34-944 was not job-related, did testify that the exam had not been demonstrated to be job-related (Transcript at 893-94) and indicated that he had "substantial doubts as to whether the test is in fact valid" (Transcript at 894-95).

Taking to heart Judge Friendly's implied caveat against "burying [ourselves] in a question-by-question analysis" of the exam (Vulcan, slip op. at 461), we merely note in passing some of the imperfections indicated by the record. Witnesses for both sides agreed that certain items in the laws, rules and regulations subtest involve guidelines that a Sergeant would have no need to apply. (Transcript at 128-30, 132-33, 553, 774.) As to all the subtests, Dr. Barrett testified as to item defects, inconsistencies, and irrelevancies with regard to numerous questions. (Transcript at 903-22.) It is unnecessary to agree with his comments as to each item to find^{that}/the record supports

his conclusion that 34-944 is not a professionally adequate examination. (Transcript at 922-23.)

More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations. (Transcript at 63-64, 117, 308, 702-703.) We conclude, as did Judge Newman in Guardians, that:

"Even if the exam need not be comprehensive as to content or constructs, the evidence does not indicate whether the few areas of knowledge and the few traits measured are the ones that will identify suitable candidates for the job.... An exam of this sort, which does not attempt to be comprehensive in testing for content or constructs, employs a sampling approach. Such an exam might, in some circumstances, be shown to meet the standard of job relatedness. But the evidence does not establish the representativeness of the knowledge or traits sampled by the exam used here." 354 F. Supp. at 792.

Given the unwillingness of both experts to state positively that 34-944 is or is not job-related, it would be foolhardy on our part to hazard such an opinion. It is, of course, barely possible that the exam is job-related; "[d]efendants' burden, however, is not to establish possibilities but to demonstrate strong proba-

bilities" (Vulcan, 360 F. Supp. at 1276 (footnote omitted)). We can say with certainty, and we are required to do no more, that the probabilities in this case run heavily against defendants. Accordingly, they have failed to meet the burden which the law imposes on them.

III. REMEDY.

We turn, therefore, to the question of relief. Plaintiffs seek 1) a permanent injunction against basing permanent appointments to the position of Correction Sergeant on the results of 34-944; 2) a mandatory injunction obliging defendants to develop a valid selection process for the position; and 3) an injunction requiring defendants to make interim and regular appointments of class members. They also seek a class action determination and an award of costs, including attorneys' fees.

Taking the class action question first, we find that plaintiffs have demonstrated the existence of a class satisfying the requirements of Rule 23 composed of all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed 34-944 or who passed but ranked too low to be appointed. ^{14/} The class is clearly too numerous to permit joinder: a total of 119 minority candidates, 103 Blacks and 16 Hispanics, took 34-944 and of these only 9 passed and only 2 (both Black) received

a score of 57 or above giving them a chance at appointment. Accordingly, the class numbers 117 persons which is more than sufficient to satisfy the demands of Rule 23(a)(1). Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972). Whether examination 34-944 discriminated against minority candidates is the question of law common to the class and plaintiffs' claims are perfectly typical of the claims of the class. ^{15/} Rule 23(a)(2) and (3). The representative parties have amply demonstrated their ability to protect fairly and adequately the interests of the class by conducting the litigation to its present successful conclusion. Rule 23(a)(4). Finally, the defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). Accordingly, it is proper that the case be treated as a class action.

We turn to the substantive relief requested by plaintiffs. Plaintiffs seek and are entitled to declaratory and injunctive relief against the use of 34-944 and the eligible list which was promulgated pursuant to it as a basis for appointments to the position of Correction Sergeant. Accordingly, examination 34-944 is

declared unconstitutional and defendants are enjoined from making appointments based on its results. Furthermore, defendants are enjoined from terminating the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants solely because of their inability to pass 34-944.

The invalidation of 34-944 clearly authorizes the court to grant appropriate affirmative relief, including mandating the creation of a new selection process to conform with the requirements of the Fourteenth Amendment and ordering the promotion of members of the plaintiff class in a ratio designed to correct the effect of defendants' unconstitutional employment practices. As the Supreme Court stated in Louisiana v. United States, 380 U.S. 145, 154 (1965):

"The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." See also, Guardians, 482 F.2d at 1340.

However, we believe it is appropriate to defer decision on the extent of affirmative relief to enable defendants to respond to the specific requests made by plaintiffs. Since, pursuant to court order, the post-trial memoranda in this case were submitted simultaneously, defendants

have not as yet had the opportunity to address themselves
the
to/recommendations contained in plaintiffs' brief and proposed order. We refer, in particular, to plaintiffs' suggestions that 1) the new selection procedure be required to conform with the EEOC Guidelines; 2) class members who are presently provisional Correction Sergeants 16/ be permanently appointed to that position; 3) an interim permanent appointment procedure be instituted which would provide for the promotion of minority persons in a ratio of at least one to each three White promotions; and 4) this promotion ratio be continued even after a valid selection procedure has been devised. Accordingly, defendants are instructed to submit an answering memorandum on these issues within ten days of the filing of this Opinion, plaintiffs to have the opportunity to reply within one week thereafter.

Finally, plaintiffs request an award of reasonable attorneys' fees. Defendants oppose on two grounds: 1) As a general rule, successful litigants cannot recover attorneys' fees from the losing party and plaintiffs have not shown themselves to fall into any exception to this rule; and 2) an award of attorneys' fees is barred by the doctrine of sovereign immunity and the Eleventh Amendment.

Defendants' first argument, while correctly stating

the general approach, overlooks a growing line of cases, discussed below, which establishes an exception in favor of plaintiffs who act as private attorneys general and who litigate not only for their own benefit but also to vindicate the rights of others similarly situated and the interest of the public generally:

"The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972).

In such cases, the protection of rights conferred both by the Constitution and by Congressional enactment requires that the normal rule be superceded. This exception to the general rule of not allowing attorney's fees derives from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), a class action under Title II of the Civil Rights Act of 1964, in which the Supreme Court stated that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Id. at 402; see also Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-97 (1970).

The fact that this suit was not brought under the Civil Rights Act of 1964, which specifically provides for the award of attorneys' fees, but rather under 42 U.S.C. §§1981 and 1983 which do not so provide, does not mandate a different result. In Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), the Court of Appeals relying on Piggie Park held that "attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in [42 U.S.C.] Section 1982." Id. at 144. Indeed, ^{the fact that} subsequent Congressional legislation in furtherance of the same objective provided for the award of attorneys' fees was considered by the Lee court to be relevant to a determination of appropriate remedies under the earlier Civil Rights Acts, which do not enact a panoply of specific remedies:

"[I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this."
Id. at 146.

We note, in this context, that Title VII of the 1964 Act, which provides a parallel route to the one chosen by plain-

tiffs here, allows for the award of attorneys' fees. 42
U.S.C. §2000/^{e-5(k).} Furthermore, the absence of specific
remedies in the earlier Civil Rights Acts authorizes the
court to exercise its broad equitable power to include in
the relief any remedy which furthers the vindication of
Constitutional and Congressional policy, whereas if the
statutes detailed the types of relief which they author-
ized and omitted attorneys' fees they would bar by in-
ference such an award. Fleischmann Distilling Corp. v.
Maier Brewing Co., 386 U.S. 714 (1967); Harper v. Mayor
and City Council, 359 F. Supp. 1187, 1217-18 (D. Md. 1973).

Because the issue is important and novel, at least
in this Circuit, we list at greater length than might
otherwise be required some of the recent decisions which
have granted attorneys' fees in suits under §§1981-83 on
the "private attorney general" theory, despite the absence
of statutory authorization and without relying on a showing
of bad faith or unreasonable obduracy by defendants. See
Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972); Knight
v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern
Homes Sites Corp., 444 F.2d 143, 144-48 (5th Cir. 1971);
Harper v. Mayor, 359 F. Supp. 1187, 1217-18 (D.Md. 1973);
Wyatt v. Stickney, 344 F. Supp. 387, 408-409 (M.D. Ala.
1972); Sims v. Amos, 340 F. Supp. 691, 694-95 (M.D. Ala.)

(three judge court), aff'd, 409 U.S. 942 (1972); NAACP v. Allen, 340 F. Supp. 703, 708-10 (M.D. Ala. 1972); Bradley v. School Board, 53 F.R.D. 28, 41-42 (E.D. Va. 1971); Morrow v. Crisler, 4 E.P.D. ¶7584 (S.D. Miss. 1971). See also Brewer v. School Board, 456 F.2d 943, 951-52 (4th Cir. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98-102 (N.D. Cal. 1972). We note particularly that Cooper v. Allen, Harper v. Mayor, NAACP v. Allen and Morrow v. Crisler are cases which, like the suit here, were brought under 42 U.S.C. §§1981 and 1983 to vindicate the right to equal employment opportunities in the public sphere. We see no relevant distinction between them and the case at hand.

Defendants' second contention, that the award of attorneys' fees is barred by the Eleventh Amendment and the doctrine of sovereign immunity, ^{17/} has been rejected in the recent case Gates v. Collier, Civ. No. 73-1790 (5th Cir., December 5, 1973). The court there affirmed an award of attorneys' fees, stating:

"This Court has said that 'such a suit as this the award of attorney's fees is not an award of damages against the State, even though funds for payment of the costs may come from the state appropriations.

* * * *

"Although the trial court had the power to assess attorney's fees and

expenses against the individual defendants found to have engaged in the unconstitutional conduct, we think it does not vitiate the award because the trial court prescribed that this part of the costs were to be payable 'from funds which the Mississippi Legislature, at its 1973 Session, may appropriate for the operation of the Mississippi State Penitentiary,' and were not to be 'the personal, or individual, liability of the varied defendants or any of them.'" Slip op. at 12-13 (footnote omitted).

The issue has also arisen and been resolved adversely to defendants position here in Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (three judge court), aff'd, 409 U.S. 942 (1972), and Ia Raza Unida v. Volpe, 57 F.R.D. 94, 101, n.11 (N.D. Cal. 1972).

Plaintiffs ask the court to determine at this time the size of the award and have submitted affidavits upon which to base the determination. To accede to their request without providing defendants the opportunity of bringing to our attention facts relevant to determining the amount in question would be improper in view of the recent decision of the Court of Appeals for this Circuit in City of Detroit v. Grinnell Corp., Civ. No. 73-1211 (2d Cir., March 13, 1974). Accordingly, defendants are instructed to include in the memorandum discussed above any facts which they wish the court to bear in mind in

determining the amount of attorneys' fees to which plaintiffs are entitled.

To sum up: Examination 34-944 is declared unconstitutional and is set aside. Defendants are enjoined from making permanent appointments to the position of Correction Sergeant from the eligible list which is based on its results and from terminating the provisional appointments to that position of plaintiff class members solely because of their failure to pass the examination. Defendants are instructed to submit a memorandum on the subjects delineated above within ten days of the filing of this Opinion, plaintiffs to reply within one week thereafter. Plaintiffs are awarded reasonable costs, including attorneys' fees, in an amount to be determined after further documentation by the parties.

It is so ordered.

Dated: New York, New York
April 1, 1974.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. Originally, there was a third named plaintiff, the Brotherhood of New York State Correction Officers, Inc. However, this plaintiff withdrew at the commencement of the trial.
2. Defendants urge us to apply the doctrine of primary jurisdiction and defer the case to the Equal Employment Opportunity Commission on the theory that by extending Title VII to cover states and municipalities Congress intended to oblige persons seeking redress against governmental discrimination in employment to resort in the first instance to the EEOC. This contention has been resoundingly rejected in cases involving suits against private employers under 42 U.S.C. §1981. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 996-97 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623-24 (8th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir.), cert. denied, 404 U.S. 998 (1971); Young v. International Telephone & Telegraph Co., 438 F.2d 757, 763 (3rd Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100-1101 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971). Furthermore, cases in this Circuit involving suits which, like the instant case, were brought under §1938 hold that the amendment to Title VII was not intended to foreclose recourse to the earlier Civil Rights Act. Vulcan Society v. Civil Service Commission, No. 73-2287 (2d Cir., Nov. 21, 1973), slip op. at 449, n.1; Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1334, n. 1 (2d Cir. 1973).
3. The total candidate pool was approximately 1,441. However, for reasons not apparent from the record, the computer display provided by defendants to describe candidate performance (PX-12) indicates the performance of only 1,383 candidates. Since both parties have based their calculations on that figure, we will do likewise.
4. Griggs arose under Title VII of the Civil Rights Act of 1964; however, the same approach to employment discrimination cases has generally been followed in §1983 cases as in Title VII cases. Vulcan, slip op. at 459, n. 9; Castro, 459 F.2d at 733.
5. The Department of Corrections appointed 87 persons from the eligible list based on 34-944 in April, 1973. (PX-2, answer to Interrogatory No. 39.) On May 29, 1973, the Department indicated that it intends to make another 40-60 appointments from the list within roughly two years from that date. (PX-2, answer to Interrogatory No. 40.)

Thus, a maximum of 147 persons will be appointed through May of 1975. No appointments are likely after that date, since another promotional exam will be given in 1974 (PX-42, p.4., 7th par.) and the eligible list from 34-944 will therefore expire in 1974 or early 1975.

6. Inasmuch as there was only one Hispanic candidate from Green Haven, the importance of this comparison should not be exaggerated.
7. The figures for White, Black and Hispanic passing rates at facilities other than Ossining and Green Haven are not in the record, but can be readily computed from those which are in evidence (see PX-33). The number of Whites at "other facilities" is 1069 (1264, the total of White candidates, minus 195, which is the sum of White candidates at Ossining, 81, and Green Haven, 114). The number of Whites at "other facilities" who passed is 328 (383 minus 55, the sum of 19 at Ossining and 36 at Green Haven). Accordingly, the passing rate is 30.7%. Blacks at "other facilities" number 14 (103 minus 89, which is 81 at Ossining and 8 at Green Haven). Two Blacks at "other facilities" passed (7 minus 5). As a result, the passing rate is 14.3%. There were six Hispanics at "other facilities" (16 minus 10, nine at Ossining, one at Green Haven). Two passed and the rate is 33.3%.
8. See also Carter v. Gallagher, 452 F.2d 315, 320, 326 (8th Cir. 1971), adopted in relevant part, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); Fowler v. Schwarzwald, 351 F. Supp. 721, 724 (D. Minn. 1972); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1103 (E.D. Pa. 1972), aff'd in relevant part by an equally divided court, 473 F.2d 1029 (3d Cir. 1973) (en banc); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, (N.D. Cal. 1972).
9. The common example which is given to highlight the different characteristics of the content and construct validation methods involves an examination for the position of typist. A content valid test would require the applicant to type. In such an instance the content of the job and of the exam is identical. A construct valid approach would identify certain traits essential to success as a typist, such as ability to concentrate, perseverance and attention to detail, and would examine the applicant for those traits. Vulcan, slip op. at 460-61.

ii.

10. The EEOC Guidelines state: "Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question." 29 C.F.R. at §1607.5(a).
11. "KS&A" is the standard abbreviation for "knowledge, skills and abilities."
12. That the goal of the audit is not coextensive and may even be inconsistent with that of a proper job analysis is demonstrated by the fact that, although the audit concluded that the Sergeant position should be reclassified to grade 17 (Transcript at 564; PX-4), the supervision sub-test called for questions appropriate to grades 10-14 and the report preparation sub-test questions were geared to an entry level investigative position (PX-8).
13. PX-43 describes the scope of prior examinations given in 1964, 1968 and 1972. However, since Siegel testified that an examination was given in 1970 (Transcript at 531-33) and since 34-944 was given in 1972, we assume that 34-007, the last examination to precede 34-944, was in fact given in 1970 and not in 1972.
14. Plaintiffs originally sought to represent as well persons who were deterred from taking the examination by defendants' discriminatory employment practices. Since they introduced no evidence as to persons who might have been deterred, plaintiffs "do not now insist upon their inclusion in the class" (Post Trial Memorandum at 64), and we decline to include them.
15. Defendants claim that the named plaintiffs cannot represent persons who passed the examination but ranked too low to be appointed because both named plaintiffs failed 34-944. However, plaintiffs' interests and those of persons who passed but whose low rank prevents their appointment are identical, and we reject defendants' contention that the claims of the former are not representative of those of the latter.
16. Plaintiffs also request the permanent appointment of Henry Liburd, a member of the class who was not provisionally appointed to the Sergeant position, because they contend that the record establishes his qualifications for permanent appointment.

iii.

17. No Eleventh Amendment or sovereign immunity problems would arise from an award of attorneys' fees against the individual defendants. Although the record might well justify such an award, it is nonetheless not within our power since the individual defendants were never properly brought before the court. Kirkland v. New York State Department of Correctional Services, 358 F. Supp. 1349, 1350, n.1. (S.D.N.Y. 1973). Accordingly, attorneys' fees can only be awarded against the two defendant state agencies.

Order to Show Cause On Behalf Of Ribeiro And Coons And Those
Similarly Situated to Intervene As Defendants Signed April 24, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND, ET AL.,	:	73 Civ 1548
	:	ORDER TO SHOW CAUSE
Plaintiffs,	:	WHY ALBERT M.
	:	RIBEIRO SHOULD NOT
-against-	:	BE ALLOWED TO INTER-
	:	VENUE AS A PARTY
THE NEW YORK STATE DEPARTMENT OF	:	<u>DEFENDANT</u>
CORRECTIONAL SERVICES, ET AL.,	:	
	:	
Defendants.	:	

Upon reading and filing of the motion to intervene as a party defendant dated APRIL 22, 1974 and the annexed affidavits of Albert M. Ribeiro and Henry L. Coons, it is

ORDERED, that the plaintiffs or their attorneys and the defendants or their attorneys show cause in Room 105 of the United States Courthouse, Foley Square, New York, New York on April 30, 1974 at 2:00 A.M./P.M. why an order should not be issued pursuant to Rule 24 of the Federal Rules of Civil Procedure granting leave to Albert M. Ribeiro and Henry L. Coons, and the class to which they belong, to intervene in the above entitled action to protect their rights and the rights of the class to which they belong, and why this Court should not withhold entry of a final judgment in this matter until after Albert M. Ribeiro and Henry L. Coons have had opportunity to present their case and the case of the class to which they belong and the court has had time to consider the rights of the class to which interveners belong; and it is further

ORDERED, that service of copies of this Order and supporting papers herein on the plaintiffs and defendants herein shall be sufficient if made by mail upon the attorneys of record for the plaintiffs and for the defendants herein on or before April 3, 1974.

Dated: New York, New York **A-201** James L. Baker
April 24, 1974 United States District

**AFFIDAVIT OF ALBERT M. RIBEIRO IN SUPPORT OF ORDER TO SHOW CAUSE
SWORN TO APRIL 22, 1974**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civil 1548

EDWARD L. KIRKLAND, ET AL.,

:

Plaintiff,

:

-against-

:

AFFIDAVIT IN SUPPORT
OF ORDER TO SHOW CAUSE
TO INTERVENE AS A PARTY
DEFENDANT

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, ET AL.,

:

:

Defendants.

:

STATE OF NEW YORK)

COUNTY OF *Westchester*) ss.:

Albert M. Ribeiro, being duly sworn, deposes and
says:

1. That he is an Employee of the New York State Department of Correctional Services.

2. That he was first employed by the Department of Correctional Services as a Correction Officer on or about June 17, 1968.

3. That on or about October 14, 1972 he participated in Examination No. 34-944 for promotion to the position of Correction Sergeant (Male).

4. That on or about March 16, 1973 he was informed that he had passed Examination No. 34-944 with a mark of 78.9.

5. That on or about March 15, 1973 an eligible list for promotion to the position of Correction Sergeant (Male) was issued and deponent was ranked higher than number 88 on such list.

6. That on or about April 12, 1973 deponent was informed by the Department of Correctional Services that he had been promoted to the permanent position of Correction Sergeant (Male) and at that time accepted the offered position of Correction Sergeant (male) and surrendered the position of Correction Officer (male) which he had until that time held.

7. That at the time of this notification deponent was employed at the Correctional Facility as Ossining.

8. That on April 12, 1973 deponent commenced employment as Correctional Sergeant (male), a position which deponent believed and had good and sufficient reason to believe was a permanent Civil Service position.

9. That subsequently deponent was informed of the commencement of this action and was informed that the position was not permanent.

10. That deponent is a Spanish Surnamed individual under Federal definition because his family is of Latin American extraction, that is West Indian and he has a Spanish sounding surname.

11. That deponent was by definition, omitted from the class of plaintiffs in this action in that he passed Examination No. 34-944.

12. That neither the plaintiffs nor the defendants nor the Court herein, has made or attempted to make deponent or any member of the class to which he belongs a party to this action even though a decision in this action will deprive the deponent and all the members of the class to which he belongs of a valuable right and will impair and impede the deponent and all the members of the class to which he belongs of their right to earn a living by advancing in the profession of their choice.

13. That deponent and all members of the class to which he belongs are in imminent danger of removal from the position of Correctional Sergeant (male) and this Court is the only forum from which an adequate remedy is available.

WHEREFORE, deponent prays leave of the Court to
intervene in the within action to establish the rights of
the class which he represents, and for the affirmative relief
requested in the interveners answer annexed hereto.

Albert M. Ribeiro
ALBERT M. RIBEIRO

SWORN TO before me this
day of April, 1974

Notary Public
NOTARY PUBLIC

**AFFIDAVIT OF HENRY L. COONS IN SUPPORT OF ORDER TO SHOW CAUSE
SWORN TO APRIL 22, 1974**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND, ET AL.,

: 73 Civil 1548

Plaintiff

: AFFIDAVIT IN SUPPORT
OF ORDER TO SHOW CAUSE
: TO INTERVENE AS A PARTY
DEFENDANT

-against-

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, ET AL.,

:

Defendants.

:

:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Henry L. Coons, being duly sworn, deposes and says:

1. That he is an Employee of the New York State Department of Correctional Services.
2. That he was first employed by the Department of Correctional Services as a Correction Officer on or about January 2, 1964.
3. That on or about October 14, 1972 he participated in Examination No. 34-944 for promotion to the position of Correction Sergeant (male).
4. That on or about March 16, 1973 he was informed that he had passed Examination No. 34-944 with a mark of over 83.
5. That on or about March 15, 1973 an eligible list for promotion to the position of Correctional Sergeant (male) was issued and deponent was ranked among the top 20 persons on that list.
6. That prior to April 12, 1973 deponent was employed as a Correction Officer at the New York State correctional facility at Cossackie, New York.
7. That upon reporting to work on the morning of April 12, 1973 deponent received a telephone call from the correctional facility at Napanoch instructing him to report to that correctional facility immediately to commence employment as a

Correction Sergeant (male).

8. That deponent travelled to the correctional facility at Napanoch on April 12, 1973 and commenced employment in the position of Correction Sergeant (male).

9. That deponent believed and had good and sufficient reason to believe that the position of Correction Sergeant (male) was a permanent position and acted in reliance upon this belief and surrendered his position of Correction Officer to undertake the position of Correction Sergeant (male).

10. That subsequently deponent was informed of the commencement of this action and was informed that the position was not permanent.

11. That deponent continued to act as a Correction Sergeant (male) at the correctional facility at Napanoch until December 1973 when he was transferred back to the correctional facility at Coxsackie as a Correction Sergeant (male).


12. That deponent and all other members of the class which he represents will be irreparably injured by any decision in this action that fails to provide for their permanent appointment to the position of Correction Sergeant (male).

13. That neither the plaintiffs nor the defendants nor the Court herein has made or attempted to make deponent or any member of the class to which he belongs a party to this action even though a decision in this action will deprive the deponent and all the members of the class to which he belongs of a valuable right and will impair and impede the deponent and all the members of the class to which he belongs of their right to earn a living by advancing in the profession of their choice.

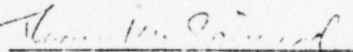
14. That deponent and all other members of the class to which he belongs are in imminent danger of removal from the position of Correction Sergeant (male) and there is no adequate

remedy available under State Law and this Court is the only forum available to protect the rights of the deponent and the class to which he belongs.

WHEREFORE, deponent prays leave of the Court to intervene in the within action to establish the rights of the class which he represents and for the affirmative relief requested in the intervener's answer annexed hereto.


HENRY L. COONS

SWORN TO before me this
22nd day of April, 1974


NOTARY PUBLIC

**AFFIDAVIT OF THOMAS W. SPINRAD IN SUPPORT OF ORDER TO SHOW CAUSE
SWORN TO APRIL 23, 1974**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND, ET AL.,	:	
	:	
Plaintiffs,	:	<u>AFFIDAVIT</u>
-against-	:	
	:	
THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL.,	:	
	:	
Defendants,	:	

STATE OF NEW YORK)	
)	SS.:
COUNTY OF ALBANY)	

THOMAS W. SPINRAD, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in New York State and am an associate of the firm of Sneeringer and Rowley P.C. the attorneys for the interveners Albert M. Ribeiro, Henry L. Coons and the class which they represent.

2. On April 23, 1974 at 12:10 P. M. I telephoned Judith Gordon, Esq. the assistant attorney general who in appearing as council for The Hon. Louis J. Lefkowitz the attorney for the defendants and gave notice to her that this order to show cause why Albert M. Ribeiro and Henry L. Coons should not be allowed to intervene in this action individually and on behalf of the class to which they belong was to be brought before The Hon. Morris E. Lasker, U.S.D.J. on April 24, 1974 at 10:30 A. M. in Room 2903 of the U. S. Court House, Foley Square, New York, New York.

3. On April 23, 1974 at 12:20 P. M. I telephoned the firm of Greenberg, Mintz, Greenberg and Baller the attorneys for the Plaintiffs in this action and gave notice to Barry Goldstein, Esq. that this order to show cause why Albert M. Ribeiro and Henry L. Coons should not be allowed to intervene in this action individually and on behalf of the class to which they belong was to be brought before The Hon. Morris E. Lasker, U.S.D.J. on April 24, 1974 at 10:30 A. M. in Room 2903 of the U. S. Court House, Foley Square, New York, New York.

York.

4. Subsequently at 12:30 on April 23, 1974 I received a telephone call from Morris J. Baller, Esq. a member of the firm of Greenberg, Mintz Greenberg and Baller who is one of the attorneys individually responsible for representing the plaintiffs in this action and I gave notice to him that this order to show cause why Albert M. Rebeiro and Henry L. Coons should not be allowed to intervene in this action individually and on behalf of the class to which they belong was to be brought before The Hon. Morris E. Lasker, U.S.D.J. on April 24, 1974 at 10:30 A. M. in Room 2903 of the U. S. Court House, Foley Square, New York, New York.

Thomas W. Spinrad

THOMAS W. SPINRAD

SWORN TO BEFORE ME
this 23rd day of April, 1974.

Richard R. Rowley

NOTARY PUBLIC

Answer of Applicants For Intervention Dated April 22, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND, ET AL.,	:	73 Civ 1548
	:	Interveners
Plaintiffs,	:	<u>Answer</u>
-against-	:	
THE NEW YORK STATE DEPARTMENT OF	:	
CORRECTIONAL SERVICES, ET AL.,	:	
Defendants.	:	

The Interveners, Albert M. Ribeiro and Henry L. Coons and all members of the class which they represent, by Sneeringer and Rowley P.C., answering the complaint herein allege:

1. Deny all knowledge or information sufficient to form a belief as to allegations contained in paragraphs marked 2(b), 2(d), 2(e), 2(f), 3, 4, 8, 11, 14, 15, 16, 18, 19, 21, 22, 24, 25 and 26 of the complaint.
2. Admit paragraphs marked 1, 2(a), 7, 10 and 23 of the complaint.
3. Deny paragraphs marked 2(c), 5, 12 and 17 of the complaint.
4. Deny all knowledge or information sufficient to form a belief as to allegations contained in paragraph 6 of the complaint except that as of the date of the commencement of the action Russell Oswald was Commissioner of the Department of Correctional Services and admit that the Department is responsible for promoting, appointing and employing persons certified to it on eligible lists.
5. Deny all knowledge or information sufficient to form a belief as to allegations contained in paragraph 5 of the complaint except deny that only one or two Blacks or Hispanic persons would be employed at any supervisory level.
6. Deny every allegation in paragraph marked 13 of the complaint except admit that appointments were made earlier than April 11, 1973.

7. Deny all knowledge or information sufficient to form a belief as to allegations contained in paragraph 20 of the complaint.

8. Deny each and every allegation of the complaint not herein before admitted, denied or concerning which interveners have alleged that they have no knowledge or information sufficient to form a belief.

AS A SEPARATE DEFENSE TO THE COMPLAINT
AND CAUSE OF ACTION AGAINST THE DEFENDANTS
HEREIN NAMED, THE INTERVENERS AS
HEREIN NAMED ALLEGE AS FOLLOWS:

9. This proceeding was originally brought under (1) 42 U.S.C. Section 1981 providing for the equal right of all citizens and persons within the jurisdiction of the United States;

(2) 42 U.S.C. Section 1983 providing the rights of Civil Action to redress deprivation under color of State Law, Statute, Ordinance, Regulation, custom or usage of rights, privileges, or immunities secured by the Constitution and Laws of the United States;

(3) The Fifth and Fourteenth Amendments to the Constitution of the United States, guaranteeing all persons against denial of due process of law by the States and their agencies and securing to all persons the equal protection of the law.

10. The interveners herein and the class which they represent are persons some of whom are black, hispanic, or members of other minority groups with a personal and property right and interest relating to the transaction which is the subject of the main action herein and will be permanently and irreparably inequitably effected by any decision herein in denial of their right to equal protection and due process of law. The interveners and the class which they represent are so situated that the disposition of this action will impair, impede and extinguish their ability to protect such interests and rights. The plaintiffs and defendants each have interests opposed to and in conflict with the interests

of the named interveners and the class which they represent and will not adequately represent the interests of the named interveners and the class which they represent.

The interveners herein meet all the requirements of Rule 24(a) of the Federal Rules of Civil Procedure for intervention on a matter of right.

11. The named interveners and the class which they represent are persons so situated that they should have been joined as parties in this action pursuant to Rule 19 of the Federal Rules of Civil Procedure in that they claim an interest relating to the subject of the action and are so situated that the disposition of the action in their absence will impair, impede and extinguish their ability to protect their interests. The joinder of the named interveners and the class which they represent would not have and will not deprive this Court of jurisdiction over the subject matter of the action.

12 a. Interveners bring this intervention as a class action pursuant to Rule 23(b) (1) (B) of Federal Rules of Civil Procedure because any adjudication with respect to any individual member of the class would as a practical matter be dispositive of the interests of all other members of the class not parties to the adjudication and would impede, impair and extinguish their ability to protect their interests.

12 b. The class includes all persons similarly situated to the named interveners to wit: all persons presently employed by the New York State Department of Correctional Services who participated in Civil Service Examination No. 34-944 for permanent appointment to the position of Correction Sergeant (male), and by virtue of their performance on that examination were eligible for and received promotion to the position of Correction Sergeant (male) in reliance upon notices received from the Department of Correctional Services and all other persons who participated in said examina-

tion and who, by virtue of their performance on that examination were eligible for promotion to the position of Correction Sergeant (male) when reached on the eligible list.

12 c. The class as defined above includes 501 persons including 113 who are presently employed as Correction Sergeants (male) at various locations within New York State and with varying work schedules. The number of members of this class makes joinder of all class members impractical.

12 d. The named interveners, Albert M. Ribeiro and Henry L. Coons, are fully representative members of the class and will fairly and adequately protect class members' interests. They are, as more fully set forth below, Correction Officers who have sought promotion to the rank of Correction Sergeant (male), who have taken examination number 34-944, who have passed examination number 34-944 and who were informed by the Department of Correctional Services that they had received a promotion to the permanent rank of Correction Sergeant (male). The named interveners and the class which they represent are in imminent danger of losing their present positions and standing on the eligible list as a result of this action but were not joined as parties to this action, have not participated in this action; have never been brought within the jurisdiction of this Court and have never been granted the due process in this action which effects their personal and property rights. The named interveners have no interests antagonistic to the other members of their class, and are not engaged in a collusive law suit. They are represented by counsel experienced and competent in the conduct of litigation of this nature.

12 e. The questions of law common to the class include:

(1) Whether the proceedings hereinbefore taken violate the rights of the class represented by the named interveners to due process of law and equal protection of the law.

(ii) Whether the intentional omission by plaintiffs of the class to which interveners belong as parties to this action pursuant to Rule 19 of the Federal Rules Civil Procedure is sufficient to estop the plaintiffs from challenging the right, of the class of persons to which named interveners belong, to the permanent Civil Service positions of Correctional Sergeant.

(iii) Whether the failure of the plaintiffs to join the class to which interveners belong as parties to this action and the determination of the rights of the parties by this Court without the joinder of the class to which named interveners belong is a deprivation of personal and property rights without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

13 a. Intervener Albert M. Ribeiro is a citizen of the United States and the State of New York and resides in New York, New York. Intervener Albert M. Ribeiro is a Spanish surnamed individual under Federal definition in that his family comes from the West Indies and he has a Spanish sounding surname. He was first employed by the Department of Correctional Services in June of 1968 and has been continuously employed by the Department of Corrections since that date.

13 b. On or about October 14, 1972 Intervener Ribeiro participated in examination number 34-944 for promotion to the position of Correction Sergeant (male). On or about March 16, 1973 Intervener Ribeiro was informed that he had passed Examination No. 34-944 with a mark of 78.9 and was ranked among the top 90 on the eligible list for that position established on or about March 15, 1973.

13 c. On April 12, 1973 Intervener Ribeiro was informed by his Supervisor at the Ossining Correctional Facility that he had received a permanent appointment as Correction Sergeant (male). Subsequently Intervener Ribeiro was informed that his appointment was not permanent due to the Temporary Restraining Order in this action.

13 d. At no time has Intervener Ribeiro been made a party to this action which will divest him of a valuable property right without any form of hearing or due process and deny him equal protection of the law even though his identity and interests were at all times since the commencement of this action ascertainable and were known to the plaintiffs, the defendants and the Court.

13 e. Intervener Henry L. Coons is a citizen of the United States and the State of New York and resides in Green County, New York. He was first employed by the Department of Correctional Services on January 2, 1964 and has been continuously employed by the Department of Correction since that date.

13 f. On or about October 14, 1972, Intervener Coons participated in examination number 34-944 for promotion to the position of Correction Sergeant (male). On or about March 16, 1973 Intervener Coons was informed that he had passed Examination Number 34-944 with a mark of 83.4 and was ranked among the top 20 on the eligible list established on or about March 15, 1973.

13 g. On or about April 12, 1973 Intervener Coons was informed of his promotion and was informed that he was to report for duty as Correction Sergeant (male) at the New York State correctional facility at Napanoch as a Correction Sergeant (male). Prior to April 12, 1973 Intervener was a Correction Officer at the New York State correctional facility at Coxsackie. Upon arrival at the correctional facility at Napanoch, Intervener Coons commenced to act as a Correction Sergeant (male). Subsequently he was informed that the appointment was not permanent due to the Temporary Restraining Order in this action. Intervener Coons was assigned to the correctional facility at Napanoch from April 12, 1973 until December 1973 at which time he was transferred to the correctional facility at Coxsackie, as a Correction Sergeant (male).

13 h. At no time has Intervener Coons been made a party to this action which will divest him of a valuable property right

without any form of hearing or due process and deny him equal protection of the law even though his identity and interests were at all times since the commencement of this action ascertainable and were known to the plaintiffs, the defendants and the Court.

14. All members of the class represented by the named interveners participated in examination number 34-944, passed the examination and were placed on the eligibility list promulgated as the results of said examination.

15. Eighty-seven members of the class represented by the named interveners were appointed to the position of Correction Sergeant (male) effective as of April 12, 1973 and an additional thirty-one members of the class have since been appointed.

16. Upon information and belief some members of the class were informed of their promotion and new work assignments prior to April 10, 1973 and acted in reliance upon the notice from the Department of Correctional Services that they had been promoted to the position of Correction Sergeant effective as of April 12, 1973 and changed their position to their detriment.

17. Upon information and belief all members of the class took the examination and in all respects acted in reliance that the examination was proper and all those appointed changed their position when they were informed that they had been promoted to Correction Sergeant (male) by accepting such position of Correction Sergeant (male) and surrendering their position as Correction Officer.

18. Upon information and belief none of the 87 initial appointees who are members of the class represented by named interveners accepted the position of Correction Sergeant (male) upon the belief that it was of a temporary or provisional position.

19. The named interveners and every member of the class which they represent are totally without fault in the action herein.

20. All members of the class represented by the named interveners were readily ascertainable and known to the plaintiffs.

the defendants and the Court at the commencement of this action and at all times since the commencement of this action.

21. The interests of all members of the class represented by the named interveners were readily ascertainable by and known to the plaintiffs, defendants and the Court at the commencement of this action and at all times since the commencement of this action.

22. Upon information and belief the plaintiffs, the defendants and the Court intentionally ignored the provisions of the Federal Rules of Civil Procedure in failing to join the named interveners and the class to which they belong in derogation of the personal and property rights of the named interveners and the class which they represent since the named interveners and the class which they represent are real parties in interest to this action and any relief granted must necessarily effect the personal and property rights of the named interveners and the class which they represent and deprive them of valuable property rights without due process of law.

23. Upon information and belief there are sufficient unfilled, permanent Correction Sergeant (male) positions available to allow an equitable apportionment requested by plaintiffs in this case without violating the rights of the interveners and their class.

24. Upon information and belief the defendants are satisfied with the qualifications of the the Correction Officers (male) making up the class to which the interveners belong.

25. Upon information and belief the confirmation of the appointments of the named interveners and the members of the class which they represent who have been appointed and the confirmation of the eligible list would in no way limit the Court in granting the equitable relief contemplated by the plaintiffs.

26. Upon information and belief the removal or replacement

of the named interveners and the class which they represent would cause serious problems in the orderly operation of the State correctional facilities and would adversely affect the morale of the entire correction staff.

27. Upon information and belief the class to which interveners belong comprise in excess of 50% of the persons acting as Correction Sergeants (male) in the New York State penal institutions.

28. Upon information and belief action by this Court placing the authority of in excess of 50% of the Correction Sergeant (male) in question will create a dangerous situation in all of the State's penal institutions and will increase the danger to all persons connected with these institutions, Correction Department personnel and inmates alike.

29. That New York State Civil Service Law would in the absence of an order to the contrary by this Court require the demotion of all members of the class to which interveners belong and would place the State's penal institutions in a chaotic state.

30. The removal of the 118 appointed members of the class represented by the named interveners would result in an immediate and irreparable injury to the members of the class represented by the named interveners that is the relegation of the members of the class to position inferior in responsibility, desirability, eligibility and/or pay to their present position. And would create a situation in the correctional facilities subjecting the individual members of the class to abuse, ridicule and actual danger from the inmate population based upon the decision of this Court.

31. The continuation of the 118 appointed members of the class represented by the named interveners as Provisional Sergeants and denying them permanent appointments would interfere with the orderly running of the correctional facilities of the State and would create a situation in the correctional facilities subjecting the

Court placing the authority of the members of the class in question and there can be no assurance that the defendants will be able to produce a test that will satisfy this Court in a reasonable time; thus continuing the situation for an undetermined length of time; and this uncertainty would in itself constitute an irreparable injury.

32. The acts described in paragraphs 20, 21 and 22 above relating to the maintenance of this action by the plaintiffs and the decision rendered by this Court without joinder of the class represented by the named interveners results in a deprivation of a valuable property right without due process of law under color of Federal Statute and is a violation of the due process guaranteed of the Fifth Amendment of the Constitution.

33. Named interveners and the class which they represent have no adequate remedy at law. Any determination of this action will act as a final determination of their rights and deprive them of valuable property rights without due process of law.

PRAYER FOR RELIEF

Wherefore, interveners, on behalf of themselves and the class they represent, request this Court grant them the following relief:

A. Enter a declaratory judgment declaring that the plaintiff and defendants are estopped from challenging the right of the named interveners and the class which they represent pursuant to the eligibility list to hold the permanent position of Correction Sergeant (male).

B. Enter a preliminary and permanent injunction enjoining the named defendants, their officers, agents, employers, and successors in office from removing the named interveners and the class which they represent from the permanent positions of Correctional Sergeant (male).

C. Enter a preliminary and permanent injunction en-

joining the plaintiffs and the class which they represent from challenging or otherwise interfering with the right of the named interveners and the class which they represent to hold the permanent position of Correction Sergeant (male).

D. Enter a preliminary and permanent injunction mandating that the appointments of the named interveners and of the class which they represent and of the named plaintiffs and of the members of the class which they represent who hold provisional appointments to the position of Correctional Sergeant (male), be made permanent and that the provisional appointments so held be made permanent from the date of the provisional appointments.

E. Enter a preliminary and permanent injunction enjoining defendants, their officers, agents, employees and successors in office from unlawfully discriminating, in any manner whatsoever, against Black, Hispanic or other persons, however situate with respect to appointment to the position of Correction Sergeant (male).

F. Grant interveners and the class they represent such other and further equitable relief as may be appropriate, including suitable affirmative orders designed to effectuate the relief herein sought.

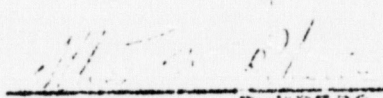
DATED: April 22, 1974

Respectfully submitted,

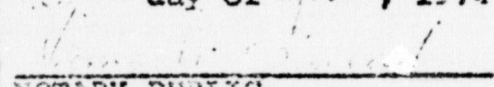
BY Richard R. Rowley
Richard R. Rowley
Attorney for Intervenors
90 State Street
Albany, New York 12207
Tel. No. (518) 434-6137

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

The undersigned Albert M. Ribeiro, being duly sworn, deposes and says that he resides at 401 Manhattan Avenue, New York, New York 10026; that he is one of the named interveners herein; that he has read the foregoing answer; and that the allegations of answer are true to his own knowledge except as to matters therein alleged on information and belief, and as to those matters he believes them to be true.


ALBERT M. RIBEIRO

SWORN TO before me this
27th day of April, 1974


NOTARY PUBLIC

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

The undersigned Henry L. Coons, being duly sworn, deposes and says that he resides at 263 Grandview Avenue, Catskill, New York; that he is one of the named interveners herein; that he has read the foregoing answer; and that the allegations of answer are true to his own knowledge except as to matters therein alleged on information and belief, and as to those matters he believes them to be true.

Henry L. Coons
HENRY L. COONS

SWORN TO before me this
22nd day of April, 1974
James W. Conrad
NOTARY PUBLIC

NOTICE OF MOTION TO JOIN ADDITIONAL DEFENDANTS DATED JUNE 21, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES; PETER PREISER, individually and in
his capacity as Commissioner of the New York
State Department of Correctional Services;
THE NEW YORK STATE CIVIL SERVICE COMMISSION;
ERSA POSTON, individually and in her capacity
as President of the New York State Civil
Service Commission and Civil Service Com-
missioner; MICHAEL N. SCELSE and CHARLES F.
STOCKMEISTER, each individually and in his
capacity as Civil Service Commissioner,

Defendants.

73 CIV 1548

MEL

SIRS:


PLEASE TAKE NOTICE that upon the annexed Affidavit of
Jeffrey G. Plant, sworn to the 21st day of June, 1974, upon
the Memorandum of Law in Support of this Motion, and upon all
the pleadings and proceedings heretofore had herein, Intervener-
Defendants, Ribeiro and Coons will move this Court at a motion
term thereof, to be held before Hon. Morris E. Lasker, District
Court Judge, in Room 2903, United States Court House, Foley
Square, Borough of Manhattan, City and County of New York, on
the 2nd day of July, 1974, at 10 o'clock in the forenoon or as
soon thereafter as counsel may be heard, for an Order pursuant
to Rule 21, Federal Rules of Civil Procedure, adding to this
action as parties defendant all of those persons who took and
passed Examination No. 34-944 for promotion to the position of
Correction Sergeant (Male), such addition of parties to be

made on such terms as will best serve the interests of justice,
and for such other and further relief as may be just and
equitable.

DATE: June 21, 1974

Yours, etc.

RICHARD R. ROWLEY
Attorney for Intervener-Defendants,
Ribeiro and Coons
Office & P. O. Address
90 State Street
Albany, New York 12207
Telephone: 518-434-6187

by: 
JEFFREY G. PLANT, Partner

SNEERINGER & ROWLEY P.C.
Office & P. O. Address
90 State Street
Albany, New York 12207
Telephone: 518-434-6187

OF COUNSEL TO Richard R. Rowley, Esq.

Affidavit of Jeffrey G. Plant In Support Of Motion To Join
Additional Defendants Sworn to June 21, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES; PETER PREISER, individually and in
his capacity as Commissioner of the New York
State Department of Correctional Services;
THE NEW YORK STATE CIVIL SERVICE COMMISSION;
ERSA POSTON, individually and in her capacity
as President of the New York State Civil Service
Commission and Civil Service Commissioner;
MICHAEL N. SCELSE and CHARLES F. STOCKMEISTER,
each individually and in his capacity as Civil
Service Commissioner,

Defendants.

:
:
:
: AFFIDAVIT IN
SUPPORT OF
: MOTION TO ADD
DEFENDANTS
: PURSUANT TO
RULE 21

: 73 CIV 1548

MEL

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JEFFREY G. PLANT, being duly sworn, deposes and says

that:

1. Deponent is an attorney duly licensed to practice law
in the State of New York and is associated in the practice of law
with Richard R. Rowley, attorney for the Intervener-Defendants
Ribeiro and Coons. Deponent is familiar with the pleadings and
proceedings heretofore had herein.

2. Deponent makes this affidavit in support of a motion
by Intervener-Defendants Ribeiro and Coons pursuant to Rule 21,
Federal Rules of Civil Procedure, for the addition to this action
as defendants all those persons who passed Examination 34-944.

3. Upon information and belief, all persons who passed
said examination have important interests in the remedies pro-
vided by this Court in this action, and valuable rights of
some or all of those persons will be directly affected by this

Court's order herein.

4. Upon information and belief, substantial interests of justice require the naming as defendants of all those who passed Examination 34-944. This Court has previously denied so much of the motion of Intervener-Defendants as sought to intervene as representatives of a class composed of all those persons who passed Examination 34-944.

5. Upon information and belief, Intervener-Defendants continue to believe that the class they sought to represent was a proper and suitable class pursuant to the applicable rules of the Federal Rules of Civil Procedure and cases decided pursuant thereto. However, after denial by this Court of the motion to intervene on behalf of the class, Intervener-Defendants believe that the rights of the persons who would have made up the class should be protected by their addition as parties defendant. Such a step would eliminate any questions as to the propriety of the class action format or as to the manageability of the class.

6. Upon information and belief, the group of persons whose joinder as defendants is sought by this motion numbers between 390 and 400.

7. Upon information and belief, addition of said group as defendants would not unduly delay the entry of a final order in this action. The decision on the merits is now binding upon those persons, and their addition as parties is sought to protect their rights and interest vis-a-vis the provisions of this Court's order granting relief, which deponent believes will have impact upon the rights and privileges enjoyed by the persons whose addition as parties is sought. Addition of parties is further sought to insure that all persons directly affected by the final order in this action will have full rights of appeal, should an appeal be necessary to protect their rights.

8. Upon information and belief, this Court's decision on the merits of this action stated or strongly implied that any relief granted pursuant to that decision would have an impact upon the employment rights and privileges of the class sought to be added as parties by this motion. The interests of justice require that persons to be directly affected by a final order be before the Court, and have their rights to enforce or appeal from such a final order protected.

9. This Court has directed the attorney for Intervener-Defendants to submit a proposed order for the Court's consideration. That proposed order will contain provisions providing for the continuing jurisdiction of this Court over questions of the implementation and validation of any future tests for Correction Sergeant that may be provided for by the order of this Court. Upon information and belief, the proposed order of plaintiffs' will seek similar provisions for the continuing jurisdiction of this Court. The preparation, validation, implementation and judicial review of a new examination may take many months.

10. Upon information and belief, the interests of justice require the addition as parties of all those persons who passed Examination 34-944 would not unduly prejudice the rights of the present parties and would be in the interests of justice as those who passed the former exam may be directly affected by the methods of implementing the successor examination or by other relief which may be granted by this Court. As no final decision as to the relief to be granted has yet been made, and since the full implementation of the relief may continue for many months, the interests of obtaining a speedy resolution would not seem to be so pressing as to overcome the interest of protecting the valuable rights in public employment of those who passed Examination 34-944.

11. Upon information and belief, denial of this motion could lead to the deprivation of valuable rights of those who passed the prior examination and those who have been appointed Correction Sergeants, all absent due process of law.

12. Upon information and belief, neither the plaintiffs nor the State agencies and officials named as defendants have interests congruent with those of the individuals who passed Examination 34-944, nor is there any necessary community of interests. While the public bodies and officers involved in this action may have an abstract interest in questions applicable to those who passed the exam, the State bodies have no necessary duty to protect the individual rights of those persons. While Ribeiro and Coons share a community of interest with many of those who passed the exam, they are not similarly situated to all of those who passed. Moreover, having been denied representation of the class, Ribeiro and Coons have no further legal obligation to present those who passed the exam in this action.

13. Deponent believes that justice requires the addition as parties defendant pursuant to Rule 21 all of those persons who passed Examination 34-944, and that an order adding such persons will not unduly prejudice other parties to this action nor unduly delay this action. Deponent further believes that such an order will serve the interests of judicial economy by preventing individual motions to intervene by some or all of those parties sought to be added by this motion.

5/ Jeffrey G. Plant

JEFFREY G. PLANT

Sworn to before me this
21st day of June, 1974.

15/ Gail A. Jones

NOTARY PUBLIC

TRANSCRIPT-REMARKS OF THE HON. MORRIS E. LASKER IN CHAMBERS
ON JULY 15, 1974

hprf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
EDWARD L. KIRKLAND and :
NATHANIEL HAYES, et al., :

Plaintiffs, :

-against- :

73 Civ. 1548

THE NEW YORK STATE DEPARTMENT :
OF CORRECTIONAL SERVICES, et al., :

Defendants. :

-----x
BEFORE:

HON. MORRIS E. LASKER,

District Judge

New York, New York
July 15, 1974 - 11:20 a.m.

APPEARANCES:

DEBORAH GREENBERG, ESQ.,
Attorney for Plaintiff,

THOMAS W. SPINRAD, ESQ.,
Attorney for Intervener Defendant

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the State of New York
BY: JUDITH A. GORDON, ESQ.,
STANLEY L. KANTOR, ESQ.,
Of Counsel.

THE COURT: I requested the parties, including the counsel for what are actually at the moment still proposed interveners since I haven't formally ruled on their motion, to meet with me at this time because there are a number of motions pending and I have received from all counsel, including the proposed interveners, suggestions as to the form of an order to implement the opinion here.

Clearly that question as the question of remedy is of enormous importance, and I do want to review it in some detail after I have disposed of the items that are pending and require action by the Court.

I will take these up in the following order:

First the motion to intervene. Second, the motion by the proposed intervener is that a class of defendants be recognized, which would include every person effected, practically, who is not a member of the class of plaintiffs.

Third, motion by the plaintiffs to serve the individual defendants, and fourth a motion by the proposed interveners to add as parties defendant under Rule 21, all persons who have past examination 34944.

On the motion to intervene that motion is granted subject to the following conditions:

One. That the interveners shall not have the right to litigate any matter which might have been heretofore

litigated by an intervener, had he been a party to the suit from its outset. This limitation on the right to litigate, including but not limited to: A, the ethnic impact of the examination. B, the job relatedness or nonjob relatedness of the examination. C, whether Examination 34-944 has been shown to have any significant degree of job relatedness for any class of persons. D, whether the performance on 34-944 of interveners or of plaintiffs or their class is indicative of such persons' qualifications for the sergeant position. E, whether plaintiffs may properly maintain their class action as defined in the Court's opinion. F, whether promotions assuring an appropriate ratio of plaintiff class members may be a proper and lawful remedy for the discrimination found by the Court.

I am now prepared to rule on the interveners' motion on a class action. That motion as I have previously and informally advised at least the counsel for the interveners is denied for the following reasons.

First, the motion is not timely within the meaning of the rule permitting motion to intervener within the spirit of Rule 23, which contemplates action with regard to class matters and class determinations as early, not as late as possible.

Second, in my considered judgment the class

action would not within the meaning of 23B3 be a superior method for determining the claims of the proposed intervenor or class.

Third, I do not find that there is any need for class action in order to determine the rights of those variously affected by the relief which may be granted in this case or for their protection. I am convinced that the defendants and the interveners and indeed the plaintiffs themselves, have brought to the attention of the Court the possible impact of varying methods of disposing of this case on the different groups involved.

Finally, I note that the denial of the class action here constitutes no death knell to the final disposition of the case for any persons concerned.

I come now to the third item which I mentioned at the outside of the discussion, namely, plaintiff's motion to serve the individual defendants in this case. That motion is denied with the following comments, which were intended to be included in an endorsement to the motion, which was never formalized:

Before a defendant can be made personally liable for money judgment he must be given timely notice to permit him to present an adequate defense. De facto notice can't substitute for service pursuant to the federal rules.

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Unless they were served a defendant would have the right to decline to participate in the lawsuit because unless they were properly brought in their interest in the case were not in jeopardy.

Plaintiffs relied too heavily on the dictum in Footnote 17 to our opinion of April 1, 1974. The statement contained therein was intended merely to explain the necessity for confronting the amendment question raised by awarding damages against the state agencies, not to constitute a determination as indeed it could not, of the liability of any individual defendant who had not been served.

Finally, I come to the intervener's motion to add as party defendants under Rule 21 all persons who pass Examination 34-944. That motion is denied for the following reasons:

First of all, in this widely publicized case, in which the Court itself has been made aware by considerable correspondence of the knowledge of persons affected by its pendency, and ultimate outcome, the motion is to be considered untimely.

Second, in my view there is a serious question as to whether the intervers have standing to propose the addition of all other persons who pass Examination 34-944 as an additional party defendants.

Third, and perhaps as important as anything, is that the Court has no evidence before it of the desire of such proposed defendants to participate in this litigation which, as I have earlier indicated, has been widely publicized and of which I take judicial notice that its contents have been well known to those who knew the facts.

Ladies and gentlemen, that brings us to the thorny question of relief.

Off the record.

(Discussion off the record.)

THE COURT: We have been discussing the necessity for the creation of a new selection procedure, which really means of a new test. The discussion, as I understand it, had boiled down to the following:

Plaintiffs recommend that new examination be content validated in advance, and approved by plaintiffs' counsel and the Court, if there is a dispute between plaintiffs' counsel and defendants or interveners; that after the examination has been administered and appointments have been made at an appropriate time, a predictive validation of the test be conducted, that is, that the performance of those who were actually appointed on the job, be compared with their performance on the examination.

The defendants, and I assume interveners but I'm not sure, in any event, the defendants differ from the plaintiffs in the following respects:

First, they do not believe that the Court has the authority or if it has the authority should exercise the authority to specify what methods of validation should be applied to the new examination.

Secondly, they do not believe that the state should be required to validate the test by predictive or criterion validation, although they informally agree that in the creation of the test, the necessity to establish it as job related would almost certainly require its content validation.

All the parties are agreed that it is vital that the test be put together and approved as soon as possible. The Court has indicated that he will review the cases brought to as an intention by the attorney for the state, particularly Court of Appeals opinions in Vulcan, Bridgeport Guardians and Guardians Association of the New York City Police Department, to determine whether or not the Court of Appeals has placed any limits on the right of the trial court to specify what validation procedures should be applied in the establishment of new examinations.

If the Court finds that counsel for the state

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2 is correct in her contention that the District Court
3 may not specify such facets, then the order of course will
4 not include such specification.

5 On the other hand, if the Court reads those
6 cases differently, and finds they continue to allow the
7 District Court to exercise its discretion in this prime
8 example of an equitable matter then the Court will exercise
9 its discretion in favor of the proposal of the plaintiff.

10 (Adjourned.)

Endorsed Order On Motion By Ribeiro And Coons And Those Similarly
Situating To Intervene As Defendants Dated July 18, 1974

7/18/74

Motion to intervene granted
in accordance with statement on
the record 7/15/74.

Motion by intervenor-defendants
for a class action determination
denied in accordance with statement
on the record 7/15/74.

It is so ordered.



James H. Coons

U.S. D.J.

JUL 19 1974

Motion denied in
accordance with
Statement on the
record 7/15/74

It is so ordered

191 Marshall Baker

U.S.D.J.

Defendants' Notice Of Appeal From April 1, 1974 Opinion And Order
Dated April 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES; PETER PREISER,
individually and in his capacity as
Commissioner of the New York State Depart-
ment of Correctional Services; THE NEW YORK
STATE CIVIL SERVICE COMMISSION; ERSA POSTON,
individually and in her capacity as
President of the New York State Civil
Service Commission and Civil Service
Commissioner; MICHAEL N. SCELSI and CHARLES
F. STOCKMEISTER, each individually and in
his capacity as Civil Service Commissioner,

Defendants.

X

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: NOTICE OF APPEAL

: 73 Civ. 1548

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Notice is hereby given that defendants above named
hereby appeal to the United States Court of Appeals for the
Second Circuit, from the judgment and order entered on or about
April 2, 1974 declaring New York State Civil Service examination
no. 34-944 unconstitutional and setting it aside; enjoining
defendants from making permanent appointments to the position
of Correction Sergeant from the no. 34-944 eligible list; enjoining
defendants from terminating the appointments of plaintiffs
and class members as provisional Sergeants solely because of
their failure to pass examination no. 34-944; granting plaintiffs'
motion for a class action order and defining the class as
all Black and Hispanic Correction Officers or provisional
Sergeants who failed examination no. 34-944 or who passed but
ranked too low to be appointed; and awarding attorneys fees
to plaintiffs; and from each and every part thereof.

Notice is hereby given that defendants above named include in this appeal the interlocutory order issued on or about April 10, 1973 staying defendants from terminating the appointments of the named plaintiffs and all other Blacks and Hispanics as provisional Correction Sergeants pending the disposition of the action by the District Court.

Dated: New York, New York
April 30, 1974

Yours etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

JUDITH A. GORDON
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 438-5896

ORDER AND DECREE OF JULY 31, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

Plaintiffs,

73 Civ. 1548

-against-

THE NEW YORK STATE DEPARTMENT OF CORREC-
TIONAL SERVICES; RUSSELL OSWALD, individu-
ally and in his capacity as Commissioner of
the New York State Department of Correction-
al Services; THE NEW YORK STATE CIVIL
SERVICE COMMISSION; ERSA POSTON, individually
and in her capacity as President of the New
York State Civil Service Commission and
Civil Service Commissioner; MICHAEL N.
SCELSI and CHARLES F. STOCKMEISTER, each
individually and in his capacity as Civil
Service Commissioner,

ORDER AND
DECREE

Defendants.
-----X

This action having been tried to the Court without a jury, and the Court having made findings of fact and conclusions of law by Opinion dated April 1, 1974 (374 F. Supp. 1361), declaring Examination No. 34-944, prepared by the Civil Service Commission of the State of New York and administered by the Department of Corrections of the State, for promotion to the grade of Correction Sergeant to be unconstitutional, and setting it aside; and the original parties hereto and the intervenors having filed memoranda in relation to the relief which should be afforded in accordance with the findings and conclusions of the Court, and the Court having thereafter conferred with counsel as to the terms of such relief, it is

ORDERED, ADJUDGED and DECREED:

1. Examination No. 34-944 is declared invalid as violating the Constitution of the United States.

2. The defendants New York State Department of Correctional Services and New York State Department of Civil Services, and the named defendants Oswald, Poston, Stockmeister and Scelsi, and their agents, employees, and successors in office are permanently enjoined from (a) making permanent or provisional appointments to the position of Correction Sergeant (Male) in the New York State Department of Corrections based upon the results of Examination No. 34-944 or any eligible list promulgated pursuant to that examination; and (b) administering, promulgating eligible lists based upon, or in any way acting upon the results of Examination No. 34-944 for the position of Correction Sergeant (Male).

3. The defendants, their agents, employees, and successors in office, are mandatorily enjoined to develop a lawful non-discriminatory selection procedure for the position of Correction Sergeant (Male). In so doing, they shall adhere to the following general guidelines:

(a) The new selection procedure shall be developed within the shortest practicable period.

(b) The new selection procedure shall be developed and, before usage for promotional purposes, validated in accordance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607.1 (1970), as those Guidelines are or as later revised.

(c) All validation studies pursuant to this decree shall be performed by means of empirical, criterion-

related validation techniques insofar as feasible.

(d) The selection procedure to be developed may include a written examination, and may also include other selection instruments or procedures.

4. During the period required for the development of a lawful, non-discriminatory selection procedure for permanent appointments to the position of Correction Sergeant (Male), the Court will entertain requests by defendants or their successors in office for permission to make such appointments under an interim procedure subject to the following provisions:

(a) Any such request shall set forth a statement of the circumstances which render such appointments necessary or desirable.

(b) The request shall specify the number of appointments to be made, and the desired effective date(s) of such appointments.

(c) The request shall set forth the nature of the interim procedure to be relied upon to select persons for promotion to Correction Sergeant (Male), and the reasons for employing that particular procedure, and the reasons assuring that the procedure will be based on merit and fitness and will be non-discriminatory in effect.

(d) The request shall pledge, and the subsequent appointments shall reflect, that members of the plaintiff class shall receive at least one such promotion by the interim procedure for each three such promotions received by persons not members of the class defined herein

This numerical requirement shall be annulled at such time as the combined percentage of Blacks and Hispanics in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Blacks and Hispanics in the ranks of Correction Officers (Male).

(e) Copies of requests shall be submitted to counsel for plaintiffs or their designee when submitted to the Court, and plaintiffs' comments thereon, made within no more than ten days or such shorter period as the Court may specify upon an appropriate showing of urgency by the defendants, will be considered by the Court.

5. Upon completion of the development of the revised selection procedures and subject to the Court's approval thereof, the defendants, their agents, employees and successors in office are enjoined from failing to appoint as permanent Correction Sergeants (Male) pursuant to the new procedures at least one Black or Hispanic employee for each three white employees so appointed, until the combined percentage of Black and Hispanic persons in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Black and Hispanic persons in the ranks of Correction Officers (Male).

6. The parties are directed to confer with a view to proposing jointly to the Court a detailed procedure for the execution of the steps set forth in this decree, if agreement is possible. The parties shall submit their joint or, if necessary, separate proposals as to these steps within thirty (30) days after the date of this decree. The joint or separate proposals shall provide for submission of any

proposed selection procedure to the plaintiffs for review and to the Court for approval prior to the initiation of the selection procedure for promotional purposes.

7. The Court retains jurisdiction for such period as is necessary to supervise this decree and further proceedings thereunder, and to determine the reasonable value of plaintiffs' attorneys' services.

Dated: New York, New York
July 31st, 1974.

MORRIS E. LASNYE
U.S.D.J.

Defendants' Notice of Appeal From July 31,
1974 Order And Decree Dated August 20, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of all
others similarly situated,

Plaintiffs.

against

NOTICE OF APPEAL

73 Civ. 1548 MEL

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES RUSSELL OSWALD,
individually and in his capacity as
Commissioner of the New York State
Department of Correctional Services; THE
NEW YORK STATE CIVIL SERVICE COMMISSION;
ERSA POSTON, individually and in her
capacity as President of the New York State
Civil Service Commission and Civil Service
Commissioner; MICHAEL W. SCELSI and
CHARLES P. STOCKMEISTER each individually
and in his capacity as Civil Service
Commissioner,

Defendants.

-----X
S I R S

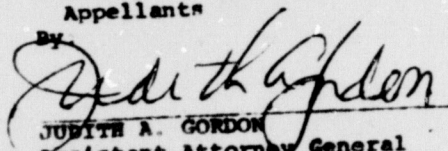
NOTICE is hereby given that defendants, and each of
them, hereby appeal to the United States Court of Appeals for
the Second Circuit from the Order and Decree entered in this
action on the 31st day of July 1974, and from each and every
part of said decree, as well as the whole thereof.

Dated New York, New York
August 20, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants

By

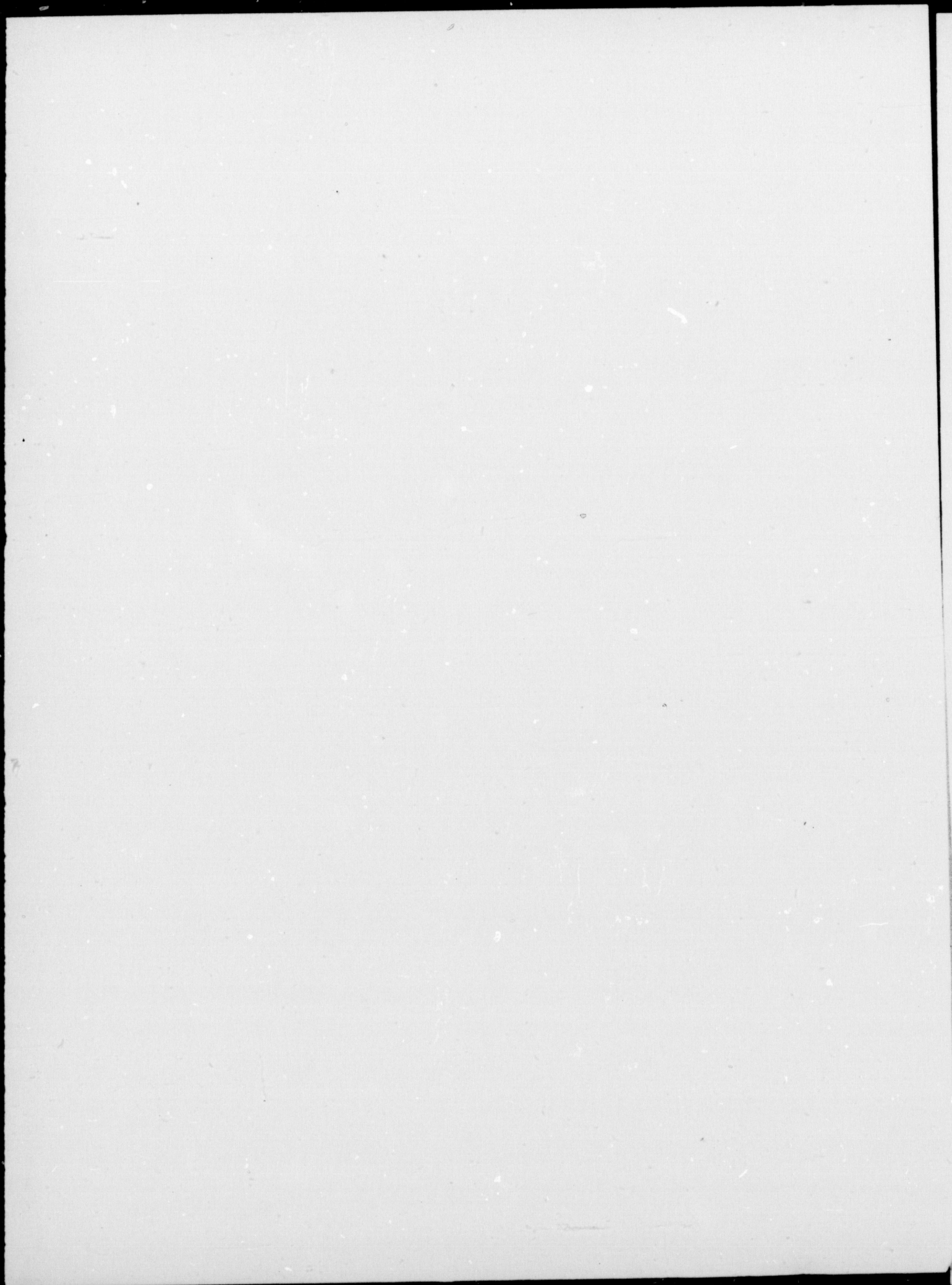


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Intervenor
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Albany, New York 12207



Notice of Appeal of Intervenor-Defendants Dated August 27, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED

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NEW YORK CITY OFFICE

EDWARD L. KIRKLAND and NATHANIEL DEPARTMENT OF CORRECTIONAL SERVICES;
each individually and on behalf of all others
similarly situated,

Plaintiffs,

73 Civ. 1548

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELISI and CHARLES P. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors.

NOTICE
OF
APPEAL

Notice is hereby given that Albert M. Ribeiro and Henry L. Coons intervenors above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order and decree dated and entered July 31, 1974 and from each and every part thereof, and each and every intermediate order effecting the final judgment aforesaid.
DATED: August 27, 1974

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